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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Case No. 78-1573

JOHN JOHNSON,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

Case No. _____

JOHN JOHNSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio dismissing petitioner's appeal for want of substantial constitutional question. The dismissal of petitioner's appeal by the Ohio Supreme Court thereby affirmed the judgment of the Ohio Court of Appeals - Eighth District, which had affirmed petitioner's convictions of aggravated murder, kidnapping and rape.

OPINIONS BELOW

The judgments of the Ohio Supreme Court dismissing petitioner's appeal and denying rehearing are unreported and are set forth, respectively, in the

separately bound Appendix at A3, A2. The judgment and opinion of the Ohio Court of Appeals - Eighth District, is unreported and is set forth in the Appendix at A4-36. The journal entry of the Court of Common Pleas, Cuyahoga County, Ohio, the trial court in this case, is set forth in the Appendix at A53-54.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing petitioner's appeal as of right was issued on November 9, 1978, Appendix at A3. Petitioner's motion for rehearing was denied by the Ohio Supreme Court on December 4, 1978, Appendix at A2. On February 15, 1979, Mr. Justice Stewart, upon application by petitioner, granted an order extending the time within which to file a petition for a writ of certiorari to and including April 14, 1979, Appendix at A1.

This petition seeks review of a final judgment rendered by the Ohio Supreme Court, the highest court in the State of Ohio in which a decision could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3) because rights, privileges and immunities under the Constitution of the United States are claimed to have been violated.

QUESTIONS PRESENTED FOR REVIEW

I.

In a state criminal trial, is a trial court required by the Due Process Clause of the Fourteenth Amendment to

grant a change of venue or a continuance where the reasonable likelihood that prejudicial pretrial publicity will prevent a fair trial is demonstrated: (1) by voir dire examination of jurors in which a substantial number of prospective jurors admit bias or are shown to be biased and (2) by affirmative proof of the prejudicial publicity, much of which has been induced by law enforcement officials and which has included attacks on the defendant's character, inaccurate and totally untrue information, evidence never offered at trial and facts which would have been inadmissible at trial?

II.

Is a warrantless search of a locked automobile which is parked in front of the home of the owner justified on the basis of the owner's consent where the search is conducted late at night, by a group of armed, uniformed police who state they are on official business, who fail to advise the owner, roused from sleep, that he may demand a search warrant and the owner simply does not resist the directives of the police? Or, is a search and seizure under these circumstances violative of the Fourth and Fourteenth Amendments?

III.

If at the time of a warrantless arrest of an accused, the only facts which were available to the arresting officers concerning the accused connected the automobile belonging to the accused to an alleged criminal incident separate from that for which the accused was arrested, but the facts also indicated

that someone other than the accused was involved in the separate incident, is there probable cause for an arrest for any crime and, if not, were statements and any other evidence obtained as a direct result of continuous interrogations from the time of arrest acquired in violation of the Fourth and Fourteenth Amendment rights of the accused?

IV.

Is the warrantless seizure of an arrestee's automobile which is parked a quarter of a mile from the location of the arrest, on private property, in the lawful custody of another, an unconstitutional seizure and are warrantless searches and seizures of the contents of the seized car, conducted approximately seven and fourteen hours after the initial seizure of the car, also violative of the Fourth and Fourteenth Amendments?

V.

Where an affidavit in support of a search warrant, drafted with the assistance of a lawyer, contains conclusory statements which are essential to any attempted showing of probable cause and which are attributed to a named informant, but the affidavit fails to set forth any facts concerning the underlying circumstances from which the informant reached his conclusion and there are no facts in the affidavit to show that the informant was credible or his information reliable and, further, facts are set forth which have no seeming connection to the establishment of probable cause and no facts to explain their connection are supplied, does the

affidavit fail to set forth sufficient facts to enable a magistrate to find probable cause, and is a search of a residence pursuant to a warrant, violative of the Fourth and Fourteenth Amendment rights of the occupants?

VI.

Should a search warrant have been voided because false statements had been included in a warrant affidavit with reckless disregard for the truth where the affiant testified at an evidentiary hearing that, at the time he drafted the affidavit with the aid of a county prosecutor and included an informant's statement concerning an attempted abduction which was essential to establish probable cause, the affiant knew that the location of the attempted abduction was one to one and one-half miles from where the murder victim had disappeared and that the attempted abduction had occurred at least one-half hour before the murder victim's disappearance, but the affidavit as drafted claimed that the abduction occurred "at or near the area" and "at or near the time" of the murder victim's disappearance so that it appeared on the face of the affidavit that the murder victim was the victim in the attempted abduction?

VII.

Where after a defendant is subjected to lengthy, continuous, night-time, custodial interrogation, statements are obtained from the defendant and the question of whether the defendant was adequately advised of his rights is hotly disputed in the record, has the

State failed to satisfy its burden of proving a voluntary, knowing and intelligent waiver of defendant's rights under the Fifth and Fourteenth Amendment?

VIII.

Was a defendant denied his rights to counsel and due process of law in violation of the Sixth and Fourteenth Amendments where defendant was arrested and subjected to lengthy, continuous, custodial interrogation and the interrogating officers took affirmative steps to persuade defendant's wife, who had appeared at the police station, not to get an attorney for defendant by advising the wife that there was no reason to secure an attorney, that she would be advised when an attorney was needed and that defendant would be released as soon as he made a statement when the officers knew that defendant was a suspect and was being interrogated as such?

IX.

Where, in a post-indictment interrogation, a defendant clearly states to the interrogating officer that he will make no statements without his attorney present, the defendant has clearly invoked his Sixth Amendment right to assistance of counsel and an oral statement obtained immediately following the expressed desire for the assistance of counsel, was the statement obtained in violation of defendant's Sixth and Fourteenth Amendment rights?

X.

Where, in a post-indictment interrogation, a defendant states unequivocally that he will not make any statement without his attorney present, the interrogation must immediately cease and where a statement is obtained after the request for the presence of an attorney, the statement must be suppressed under the rule established in Miranda v. Arizona, 384 U.S. 436 (1966).

XI.

Are a defendant's rights to assistance of counsel and due process of law violated by the admission at trial of a witness's testimony concerning pre-trial, post-indictment identification of the defendant which was conducted in the absence of defendant's court-appointed counsel, and by testimony concerning an in-court identification where no showing was made that the in-court identification was based on observations other than at the pre-trial, post-indictment identification and where prior to viewing the defendant at the pre-trial showup, the witness, a twelve-year-old child, was told by police, among other things, that the defendant had already been picked out by other children?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourth, Fifth and Sixth Amendments and the pertinent portion of the Fourteenth Amendment to the United States Constitution are set forth in the Appendix at A76-77. The text of Ohio Revised Code §§2905.01, 2907.02, 2903.01 and 2945.59 are set forth in the Appendix at A78-82.

STATEMENT OF THE CASE

Petitioner John Johnson was convicted on March 6, 1976, of the kidnapping, rape and aggravated murder of Melissa Hinke by a jury in the Common Pleas Court of Cuyahoga County, Ohio. The trial court imposed consecutive sentences of seven (7) to twenty-five (25) years for the counts of kidnapping and rape, and for the count of aggravated murder, the court imposed a sentence of death. The judgment and sentence of the trial court were affirmed by the Ohio Court of Appeals - Eighth District. While petitioner's appeal to the Ohio Supreme Court was pending, the Ohio Supreme Court modified the sentence of death to life imprisonment, in response to rulings by this Court that the Ohio statutory regime for imposing capital punishment was unconstitutional.[1]

The Ohio Supreme Court subsequently dismissed petitioner Johnson's appeal for want of substantial constitutional question.

On Thursday, November 20, 1975, Melissa Hinke, eight years old, left her home on West 67th Street in Cleveland, Ohio, to buy a half-gallon of milk at a nearby store (4T.1831-1832).[2]

1/ Lockett v. Ohio, ____ U.S. ____, 98 S.Ct. 2954 (1978).

2/ All references to the transcript of the proceedings in the trial court will be referred to by the volume number, the letter "T" and page number(s) in the transcript.

She left her home at approximately 3:10 p.m. (4T.1836) with two quart-size Pepsi Cola bottles, and some change with which to purchase the milk (4T.1832, 1842), and never returned (4T.1841). Two days later, on Saturday morning, November 22, her body was found in a wooded area (4T.1993) of the Metropolitan Park System's Rocky River Reservation (4T. 1989).

Soon after the victim's disappearance, the news media devoted extensive coverage to the search for the missing girl and each succeeding event.[3] The very day the body was found, Cleveland newspapers began to focus upon the grisly and brutal aspects of the crime and the investigation which supposedly connected Johnson to the crime (MA2, B3, 4). Front page and lead story coverage continued throughout the investigation. By the time of Johnson's arraignment on November 28, 1975, the community was flooded with details of the "evidence" of Johnson's "guilt", much of which was inaccurate, inadmissible and never offered at trial (e.g., MA4, 5, 7, C1, E1, D17-18).

John Johnson was in police custody when Melissa Hinke's body was found (2T.1106). Police had arrested Johnson, without a warrant, at about 7:00 p.m. of the prior evening (3T.1243, 1337), and various teams of police had

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3/ All references to media coverage will be to Petitioner's Venue Motion Exhibits filed with the trial court and will be referred to by the letter "M" followed by the letter and number identifying the exhibit.

interrogated him almost continuously (2T.1103, 3T.1253, 1287, 1348-1349), without the presence of an attorney, until shortly after the victim's body was found. During this overnight period of interrogation, police obtained oral and written statements from Johnson.

Even before discovery of the body, police had conducted three warrantless searches of Johnson's automobile (2T. 993-994, 3T.1294-1310). The first search (for which the sole justification urged by the State was consent (2T.963-964)) was conducted by four uniformed police, shortly after midnight on November 21, 1975, in front of the petitioner's apartment (2T.980, 1035, 3T.1336). The other two warrantless searches were conducted by detectives while Johnson was in custody and after Johnson's car had been seized without a warrant (3T.1251), at a gas station about a quarter of a mile from where Johnson had been arrested (3T.1263).

After discovery of the body, Johnson's home was searched under color of a search warrant (2T.1142). During this same period, in connection with the Hinke investigation, police interviewed as possible identification witnesses children and adults who had been confronted or approached by male drivers of automobiles.

Johnson was indicted on November 25 and arraigned on November 28, 1975. Upon a showing of indigency, the court appointed defense counsel to represent him. Immediately after his arraignment, Johnson was taken by detectives from the courtroom to a room in the police

station (2T.1086) where, without an attorney present (2T.1097), while surrounded by police and detectives and dressed in prison clothes (2T.863), he was viewed by identification witnesses (2T.1092-1093) and further interrogated (2T.1095-1096). A highly incriminating oral statement was obtained from Johnson during this interrogation.

At trial, the State offered into evidence a semen-stained towel (SX12) and a blue sweatshirt spotted with blood (SX9-H) which had been seized during the warrantless searches of the petitioner's car. Also received in evidence was a penknife with specks of blood on it (SX1). The penknife had been seized while Johnson was in custody, following the warrantless seizure of Johnson's automobile. From the search of Johnson's home, the State offered a pair of undershorts (SX8-K) and a washrag (SX25-E) which were stained with blood. Extensive testimony was elicited concerning the seizure and testing of these items (3T. 1628-1638, 1653-1656, 1659-1675, 1687-1689, 1692-1695, 4T.2230-2243, 2252-2253, 2257-2261). Some of the testimony established that the blood on the undershorts was not the petitioner's blood-type, but matched the victim's blood-type.

Four detectives testified at trial about the statements obtained from John Johnson during custodial interrogations on November 22 and 28, 1975. The jury also heard "prior acts" testimony (Revised Code §2945.59, Appendix at 82) by three young girls concerning alleged attempts by a man, who the State urged was Johnson, to entice the girls into

his car. Included in the "prior acts" evidence was the testimony of twelve-year-old Lisa Chambers concerning her police station show-up identification of Johnson on November 28, 1975, immediately following his arraignment, without the presence of his court-appointed attorneys. Lisa Chambers also made an in-court identification of the petitioner as the man who talked to her.

Despite clear evidence shown by the defense in motion exhibits[4/] as well as in the voir dire of prospective jurors of the prejudicial effect of the massive barrage of pretrial publicity, a pretrial motion by the defense for change of venue and/or continuance was overruled (Appendix at A56, 2T.783-784). The motion for change of venue and/or continuance was renewed later at trial and again was overruled (5T.2466, 2470).

Pretrial motions to suppress the evidence obtained from the searches and seizures detailed above because of the violation of petitioner's Fourth and Fourteenth Amendment rights were overruled by the trial court (Appendix at A55, A57-58). Similarly, motions to suppress the custodial interrogation statements of the petitioner because they were obtained in violation of petitioner's Fourth, Fifth, Sixth and Fourteenth Amendment rights were overruled by the

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4/ Prior to voir dire, stipulations were entered into the record concerning the circulation of the newspapers and the accuracy of copies of newspaper articles and television scripts submitted by the defense.

trial court (Appendix at A55, A58-61), as was a motion to suppress the identification testimony of Lisa Chambers concerning a "prior act" (Appendix at A55-62).

All of the subjects of the pretrial motions were asserted in the assignments of error lodged with the Ohio Court of Appeals - Eighth District (Appendix at A51-52). After the court of appeals in its opinion of Janaury 30, 1978, affirmed petitioner's convictions (Appendix at A4-36), petitioner timely applied for rehearing and urged that the issues raised under the United States Constitution required reversal and that the court of appeals should consider issues which it failed to address in its opinion, including the constitutional validity of identification testimony of Lisa Chambers (Appendix at A37-45). However, rehearing was denied by the court of appeals without elaboration (Appendix at A46).

Petitioner next turned to the Ohio Supreme Court and again raised the same Fourth, Fifth, Sixth and Fourteenth Amendment claims in the Propositions of Law submitted in his brief in support of appeal as had been raised before trial court and the court of appeals (Appendix at A47-50). However, the Ohio Supreme Court, without opinion, dismissed petitioner's appeal for want of substantial constitutional question (Appendix at A3) and, subsequently, denied petitioner's application for rehearing (Appendix at A2).

REASONS FOR GRANTING THE WRIT

I.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER A CHANGE OF VENUE OR CONTINUANCE IS REQUIRED WHERE THE REASONABLE LIKELIHOOD THAT PREJUDICIAL PRETRIAL PUBLICITY WILL PREVENT A FAIR TRIAL HAS BEEN SHOWN BY THE VOIR DIRE EXAMINATION OF THE JURORS AND BY AFFIRMATIVE PROOF OF PREJUDICIAL PUBLICITY, MUCH OF WHICH HAS BEEN INDUCED BY LAW ENFORCEMENT OFFICIALS AND WHICH INCLUDES ATTACKS ON THE DEFENDANT'S CHARACTER, INACCURATE AND TOTALLY UNTRUE INFORMATION, EVIDENCE NEVER OFFERED AT TRIAL AND FACTS WHICH WOULD HAVE BEEN INADMISSIBLE AT TRIAL.

The crime with which John Johnson was charged was one of the most sensational and horrifying in the experience of Cuyahoga County, Ohio. During the three-month period between the victim's death and Johnson's trial, the community in which he stood trial for his life was saturated with pretrial publicity of the most prejudicial, hostile and incriminating kind. All of the newspapers and television stations in Cuyahoga County transmitted in lurid and voluminous detail daily news accounts of Melissa Hinke's death, the fears and outrage of her neighbors, the police investigation of John Johnson, the chain of incriminating evidence against him, his partial confession of guilt, details of his character defects, sexual perversions and prior crimes of a violent or sexual nature, as well as prior unrelated violent crimes of members of his family, the opinions of police and public figures, prior to trial, of his

guilt of the sensational kidnapping-rape-murder. Deputy Coroner Lester Adelson was quoted by the media as saying that the killing was "one of the most disturbing cases I've handled" in 25 years as coroner (M. A3, A7, B19, D1, F4).[5] The media frequently referred to the fear and anger of the residents in the community. For example, a television film report included the following exchange from a resident: "It is awful, it is terrible, a young girl like that...Someone should do the same thing to him." (1T.630-631. See also M. A3, A14-15, C103, D18-19, E11-12, 19-20, F15).

Both Cleveland newspapers carried the case as a headline or front-page story for a full week following the disappearance of Melissa Hinke (M. A1-4, A7, A12, B1-5, B7, B9). Cleveland's three television stations devoted large segments of air time to the details of the crime. Every news show for a complete week, often as the lead story (M. D7, D9, D11, E8, E16, E19, E22, E27, F3, F6, F9), carried news of the crime and the police investigation focused upon John Johnson. Film reports included scenes of Johnson's appearances in court, surrounded by police and sheriff's deputies (M. D13-15, D21, E4-6).

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[5] All references to the Petitioner's Venue Motion Exhibits will hereinafter be referred to as "M" followed by the letter and number(s) identifying the exhbit.

Newspaper articles and television reports wove bits of information with rumors and innuendoes to connect Johnson with the crime. On November 24, 1975, the date of the petitioner's preliminary hearing, all three television stations broadcast details of the status of the case. WJW-TV, Channel 8, began its 6:00 p.m. news show by announcing that "police believe they have their man in the brutal murder...." (M. F6). The news report speculated that "whoever abducted the girl probably had cruised this area before." This observation was followed immediately by the comment that the petitioner worked at a neighborhood gas station and was arrested after his license number matched an earlier report of an attempt to lure a little girl into a car. The announcer commented that the petitioner was "isolated" in jail "for his own protection." WEWS-TV, Channel 5, reported that the petitioner was charged with murder, kidnapping and rape, and then stated, "police [are] accusing him of luring Melissa into his car, attacking her, and then stabbing and strangling her to death" (M. E17). In a later WEWS newscast, as the lead story, a picture of the petitioner was displayed on the screen and the announcer stated, "police are saying this man is the one who kidnapped her, raped her, and then killed her. This is John Albert Johnson...." (M. E19).

WKYC-TV, Channel 3, featured a film report of Johnson "as he was being led into the courtoom...." (M. D13-14). The news report stated that the petitioner was ordered held on $750,000 bond and that "then, a curious thing happened. Judge Matia told Johnson, 'May God have

mercy on your soul.'" (M. D14). The newscaster noted that the "comment is usually reserved for cases in which a death sentence has been pronounced...." Channel 3 also reported that Johnson was traced through his license number (M. D15), much like the report on Channel 8. All three of the television stations reported that Johnson's brother was currently in prison for killing a woman (M. D17-18, E17, F6). The Cleveland Plain Dealer also reported this "fact" (M. A5).

The Plain Dealer reported on November 24, 1975, that Johnson became a suspect after he was stopped on the day of the murder "as a suspicious character" (totally unsupported by testimony in the record) and was in "isolation...to protect him from other inmates." (M. A3). On the same date, the Cleveland Press as a front-page story reported that police indicated that petitioner "tried to lure another girl into his car earlier that day." (M. B5). A later edition of the Press, in a front-page story, carried a picture of Johnson and described his appearance in Municipal Court. The article repeated the statement that he was arrested "when police got his license number after he tried to lure another girl into his car" (M. B7). Also included were statements that police "declared they have sufficient evidence to bring [the petitioner] to trial...," that "the suspect allegedly had traces of blood...on his clothing and under his fingernails." The article further detailed the coroner's report that the victim "had been stabbed repeatedly in the face, neck, chest and abdomen. Her face had been battered

with a blunt instrument," and that she had been strangled and sexually molested. Another article in the Press that day reported that the police had said Johnson had "a violent temper when drinking" (M. B15).

On November 25th, the Plain Dealer published a large front-page photograph of the petitioner as he left Municipal Court. The accompanying article repeated the claim of the attempted abduction of another girl and identification through license plates. It also stated that police searched Johnson's apartment and car and "among the items they said they found were a pair of bloodspotted undershorts in the apartment, blood and a semen-stained towel in the car." The article also claimed that a lie detector test was given to the petitioner and he "told police he had been in a Lorain Ave. adult book store earlier Thursday." It further reported that "police said he [Johnson] had magazines portraying nude children in his possession" (M. A4).

The assertion concerning the possession of magazines portraying nude children was totally false. There was absolutely no testimony in the record to substantiate such a statement. Nevertheless, this statement was repeated by much of the media (M. A18, C1, C2, E1). In fact, Channel 5 concluded a November 25th report on the case with the remark that police said the petitioner tried to pick up another child, that police "found pictures of nude children in his home and blood-stained underwear" (M. E1, emphasis added).

A Cleveland Press article on November 25th carried a headline of "Police seek swift indictment of suspect...." After describing the slain girl in her casket, the article disclosed in bold-face type, that "blood-stained undershorts were found in a trash can at [the petitioner's] home," that there was "blood under his fingernails and...a stained towel was found in the auto." It noted that Johnson "explained that the blood was the result of a fight he got into...," that police "placed" the petitioner "in an adult bookstore about two hours before Melissa was kidnapped" and that the petitioner "claimed he had 'popped a pill' that afternoon." (M. B16).

The Plain Dealer, in a front-page story on November 26th, referred to comments by Art Modell, grand jury foreman and Cleveland Browns owner, concerning how disturbing the coroner's testimony in the grand jury had been. The article then proceeded to itemize all the "evidence" gathered to prove the guilt of the petitioner (M. A7). It reported that a police search of Johnson's home "uncovered a blood-soaked penknife...bloody undershorts, work shirt and pants and three wet rags." The article next shifted to the gruesome nature of the slaying: "a piece of blue cloth...knotted so tightly around Melissa's neck that the imprint of a button...was left in the skin." Then shifting back to the police investigation: "Found in Johnson's car, police said, were two empty soft drink bottles, a semen-stained towel, a piece of bloody fingernail, strands of brownish-blond hair and a quart of Lawson Milk Co. milk."

The report remarked, "Melissa had been sent to a Lawson store...." The article stated that "bits of shrubbery" were found in the car, implying that Johnson's car was at the scene of the crime. The article next focused on the petitioner, "in an isolation cell...to protect him from other prisoners...." The paper claimed Johnson had said "I don't remember doing it, if I did it," and that he had "celebrated his birthday" the day of the murder, "by visiting several taverns." Also mentioned was that the appellant "was fined $100.00 in Cleveland Municipal Court for pandering obscenities..." a year earlier. Finally, the article noted that public "sentiment has been growing for Melissa's family," and followed with details of the funeral of the victim.

The article was highly inaccurate, inflammatory and prejudicial. Nowhere in the record is there a shred of testimony concerning a "bloodsoaked" penknife (see 3T.1660-1661, 4T.2240, 2291), or soft drink bottles somehow connected to Melissa Hinke (4T.1882, 5T.2370-2371, 2385-2386), or a "bloody fingernail" (3T.1601, 4T.2221-2224, 2263), or strands of hair belonging to Melissa Hinke (3T.1628-1629, 1643). The alleged statement by Johnson, tantamount to a confession, potentially the most damaging single piece of publicity, is not substantiated anywhere in the record.

Cleveland television stations covered the Hinke funeral extensively. Juxtaposed with the funeral service publicity were stories of petitioner's arraignment. Channel 3 reported that Johnson was "brought to and from court under heavy guard" and that he "has been

kept in a cell by himself because jail officials fear other inmates could try to harm him." The film report also noted that "because the case has stirred such emotion and received heavy news coverage...it is almost certain the trial will be held outside of Cuyahoga County" (M. D20-21).

The Plain Dealer focused further attention on the case by devoting a full page to the case in section one of the Sunday, December 7, 1975, edition. A headline asked the question, "Did porn shops incite killing?" (M. A15). Below the headline, the caption on a photograph of an adult bookstore read:

> "A typical Lorain Avenue smut shop...Police Capt. Jerome Poelking, chief of detectives, says police information is that John A. Johnson, who has been charged with the rape murder of 8-year-old Melissa Hinke, was in a Lorain Avenue porno store...the morning of Melissa's disappearance. A homicide detective said Johnson had looked at pictures of nude children while in the store." (Emphasis added).

On the remainder of the page were letters to the editor, the texts of which were based on the details of the crime which had been publicized by the media. For example, "Johnson reportedly told police he had been in a[n]...adult bookstore...the day of the murder. Police also said he had in his possession magazines portraying nude children."

Intermittent television and newspaper coverage of the case continued until the time of the jury selection (e.g., M. A16-18, B11-14, C2-3, E9-12, E29, F18-20).

On the very first day of jury selection, February 23, 1976, Channel 5 began the first of a series of documentary reports on the subject of child molesting (1T. 350). The first program featured an interview with the victim's mother (1T.351) and contained damaging remarks about Johnson, including that Johnson had committed other crimes of a sexual nature (1T.351), that he had been under surveillance (1T.351), and that he attempted to abduct another girl for sexual purposes (1T.352). Advertisements announcing the start of the series appeared in the Plain Dealer and the Press on February 23, 1976 (1T.351).

The effects of this barrage of publicity were apparent at the voir dire of the jury. Of the forty-two talismen who were questioned in regard to pretrial publicity, eleven persons volunteered, unequivocally, that they could not be impartial as jurors because of bias formed from exposure to such publicity. All but one of the special jury panel admitted exposure to the pretrial publicity and that they had read or seen news reports about the case. Even after a court admonition against reading any newspapers or monitoring radio or television news programs, almost one-third of the panel admitted further exposure, either deliberate or inadvertent, to news media stories about the trial. In total, almost 40 percent of the entire panel of prospective

jurors questioned were dismissed on the basis of some taint as to their inability to try the accused impartially. In their effort to empanel a fair jury, defense counsel exhausted all of their peremptory challenges.

During the course of the trial and hearings on pretrial motions, the courtroom was filled with spectators. In order to obtain seating, prospective spectators were searched for weapons by sheriff's deputies stationed outside the courtroom doors. Because of crowded conditions in the courtroom, a table was provided for the press inside the rail separating the trial working area from the spectator section (5T.2467). During the voir dire, a news reporter copied, and used in a highly prejudicial news story (1T.354-355, and see M. A18), a confidential psychiatric report on the sanity of the accused which he took without authorization from the private desk area of the judge's bench.

Ultimately, because of the unrelenting barrage of publicity, the trial court sequestered the jury. But the damage had been done.

Although trial courts have initial discretion to determine whether a change of venue or continuance should be granted in a criminal case, such discretion is limited by constitutional imperative, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial...." (Emphasis supplied). Sheppard v. Maxwell, 384 U.S. 333, 362-363 (1966); accord, Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963);

Irvin v. Dowd, 366 U.S. 717 (1961). Under such circumstances, grant of change of venue or continuance is constitutionally compelled. Sheppard v. Maxwell, supra. Here, the invidious effect of pretrial publicity was shown both by lodging copies of the newspaper articles and television scripts with the court, and by voir dire examination of the prospective jurors.

Furthermore, the record can fairly be read as revealing a trial judge more concerned with orchestrating a voir dire designed to gloss over the problem of pretrial publicity than he was with probing deeply so that the effect of the publicity could accurately be gauged. For example, the trial judge posed leading questions to potential jurors designed to elicit statements of their ability to be impartial (See 1T.42-44, 47-50, 62). When defense counsel asked the court to excuse two jurors who had evidenced bias due to the massive publicity, the trial judge accused defense counsel of posing questions designed to confuse the jurors (1T.291-297). The court then posed additional leading questions to those jurors designed to cause them to recant their previous testimony (1T.297-303).

> "To deny that bludgeoning or poisonous comment has power to influence or at least to disturb the task of judging is to play make believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with

> short tenure." Pennekamp v. Florida, 328 U.S. 331, 359 (1956) (concurring opinion).

In overruling this assignment of error, the court of appeals relied principally upon Murphy v. Florida, 421 U.S. 794 (1975). However, the facts presented in Murphy are easily distinguishable from those presented here. The Court in Murphy emphasized that most of the jurors had only a vague recollection of any publicity concerning the accused and many jurors considered the publicity irrelevant, 421 U.S. at 800-801. This is in sharp contrast to the profound effect the publicity had upon prospective jurors in this case. Furthermore, the Murphy court stated that it is necessary to "distinguish between mere familiarity with [the accused] or his past [as in Murphy] and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory." 421 U.S. at 800, n. 4 (see, also, 421 U.S. at 802). In the instant case, thirteen prospective jurors demonstrated a clear bias toward Johnson as a result of publicity directed to this case. Moreover, this case presents vivid evidence of publicity which was invidious and inflammatory.

The publicity surrounding this trial focused on and pointed a guilty finger at the petitioner; it included vicious attacks upon his character; it included inaccurate and totally untrue information; it reported evidence that was never offered at trial; it reported evidence that would have been inadmissible had it been offered at trial,

much of it was induced by law enforcement officials; all of it was untempered by cross-examination. This case presents a ripe opportunity for the Court to reaffirm and clarify a trial court's duty to effect adequate prophylactic measures against prejudicial pretrial publicity in order to assure an accused a fair trial before an impartial jury. Petitioner respectfully urges the Court to grant certiorari and reverse his conviction.

II.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE INTRODUCTION AT TRIAL OF EVIDENCE SEIZED DURING A WARRANTLESS MIDNIGHT SEARCH OF PETITIONER'S AUTOMOBILE WHERE THE RECORD SHOWS MERE ACQUIESCENCE TO AUTHORITY RATHER THAN CONSENT.

Shortly after midnight (2T.980, 1035, 3T.1336), on November 21, 1975, police officers Hanton, Charvat, McGuire and Wayne (2T.972) approached John Johnson's apartment at 2006 West Boulevard in Cleveland and knocked on the door (2T.696). They were investigating the Melissa Hinke case (T.979, 1031) and had been requested to check out Johnson's auto in regard to that case (2T.967).

All four of the police gathered in the hallway outside of John Johnson's apartment door (2T.983). Charvat knocked on the door for a period estimated to be less than one minute (2T.983). Johnson had been in bed for approximately

one hour (3T.1333). Prior to that time, he had not slept for thirty hours (3T. 1334). He got out of bed and answered the door (3T.1334); he was dressed in a T-shirt and undershorts (2T.983), and appeared to have been sleeping (2T. 984).

When Johnson, a short man of small, thin build (3T.1411), opened the door to his apartment, four armed, uniformed policemen were standing there (2T. 985, 3T.1334). Their uniforms, badges and guns were plainly visible (2T.981-982, 1036, 3T.1334). One of the police officers was very tall and two others were of medium build. An older man, wearing glasses, appeared to be in charge (3T.1410). Either Charvat or Hanton (2T.1038, 970) announced that they were on official business (2T.1038); they wanted to talk to him (2T.970).

After Johnson got dressed, he was told that they all had to go outside to his car (2T.989, 1039-1040, 3T.1335, 1377). On the way to the car Officer Hanton made it plain to Johnson that he wanted to look in the interior of the car (2T.992, 3T.1378). Sometime before reaching the car, one of the policemen told Johnson to open the trunk of his car (2T.1040).

All the police walked to the car with appellant, grouped all around him (2T.1040), some in front, some alongside and behind him (2T.993). They remained in close proximity to Johnson throughout the search (2T.1040, 1042). Hanton and McGuire claimed that the police asked the appellant to open the car (2T.994, 1041). Johnson testified that

he was told to open the car door (3T. 1335, see also 1384); the police instructed him what to do (3T.1378), and he complied (3T.1335, 1337, 1410).

On intense cross-examination, Johnson maintained consistently that he did not give permission but was instructed and simply did not resist (3T.1378, 1383, 1387). He testified that "you don't go around telling a law officer you are not going to do this" (3T.1415). Johnson was never advised that he could refuse the search and demand a warrant (2T.997-998, 1039, 3T.1336-1337).

Once the doors were opened, Hanton and McGuire went inside (2T. 994) and searched the car with flashlights (3T.1382). Hanton determined what was to be taken (2T.998, 1044, 3T.1336, 1380). Police seized a towel and two sixteen-ounce Pepsi-Cola bottles from the car (2T.1027, 1028). After the search of the entire car was completed, Hanton advised Johnson that if nothing showed up in the tests of the items seized, he would not hear from the police. If he heard from the police, there would be trouble (3T.1383, 2T. 999-1000). Johnson was then told by either Hanton or Charvat that he could return to his apartment (2T.1043).

The towel, later tested and found to be semen-stained (4T.2265), the Pepsi-Cola bottles and a carton of Lawson's milk, observed but not seized from the car (2T.1042-1043), were used in support of the probable cause alleged in an affidavit in application for a warrant to search the appellant's home shortly thereafter. The semen-

stained towel was admitted at trial (5T.2448), over objection, as State Exhibit 12. The State's only justification for this search was its claim that appellant consented to it (2T.963, 964).[6] On the basis of the alleged consent, the trial court overruled appellant's motion to suppress (3T. 1533).

A prosecutor has the burden of proving that consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543 (1968). This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. Id. Schneckloth v. Bustamonte, 412 U.S. 218 (1973), teaches that in determining whether a claimed consent is in fact voluntary, voluntariness "is a question of fact to be determined from the totality of all the circumstances," Id., at 227. Schneckloth v. Bustamonte, supra, 412 U.S. at 229, mandates consideration of the "vulnerable subjective state of the person" who has allegedly consented. Moreover, courts must be especially alert for coercion, express or implied, no matter how subtle. Id., at 228.

Viewed in their totality, the facts here amount to nothing more than a tired

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[6] From the inception of the motion hearing, the prosecution's only justification for the search of the appellant's car at midnight on November 21, 1975, was its claim of consent by the appellant (2T.963, 964) and testimony was limited to that question by the trial court (2T.978).

and intimidated individual of slight stature who, awakened from sleep, uninformed of his rights and confronted by four armed police officers in the middle of the night, submitted to the demands of open and obvious police authority. As such, the only conclusion possible is that the State utterly failed to meet its burden of proving a free and voluntary consent, and the trial court's denial of appellant's motion to suppress was clearly erroneous. See Amos v. United States, 225 U.S. 313 (1921); Johnson v. United States, 333 U.S. 10, 68 (1948). Therefore, certiorari should be granted and petitioner's convictions should be reversed.

III.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS WERE DENIED BY THE INTRODUCTION OF EVIDENCE DIRECTLY DERIVED FROM THE ILLEGAL ARREST OF THE PETITIONER.

John Johnson was arrested without a warrant by Cleveland detectives on November 21, 1975, at approximately 7:00 p.m. while at work at a gasoline station (3T.1243, 1249, 1251, 1284). Detectives Murphy and Mulhull wanted Johnson to make a statement at the police station concerning his activities on November 20th (3T.1338). When Johnson told them he couldn't leave his job (3T.1338), he was arrested (3T.1249, 1251, 1284, 1338) and subsequently booked in connection with the disappearance of Melissa Hinke (3T.1255, see also 2T.949-951).

At the time of Johnson's arrest, all of the information possessed by the arresting officers Murphy and Mulhull related to an alleged attempt, the day before, to lure a girl named Kimberly Stephens into an auto on Eichorn Avenue (3T. 1241, 1257-1259), a mile and a half from where the victim was last seen (2T.1177). Detective Murphy had personally investigated the incident and had studied police reports (3T.1241). He knew that the girl was safe and had reported the incident to her parents (3T.1257-1258). He was also aware (3T.1241) that a Mr. Bosak had reported to police the license number of the auto involved in the Eichorn Avenue incident (listed to Johnson) and that Mr. Bosak described the driver of the car as having a full beard (2T.1192, 3T.1754). But Johnson had no beard.[7]

At the time of arrest, the police had no information to connect Johnson with the Hinke case. The midnight search of Johnson's car had yielded two pop bottles of a size different from those the victim had in her possession at the time of her disappearance (2T. 1001). The towel which was found in the car was tested on November 21st and, again, on November 22nd (4T.2265). But Detective Marisch testified that the police were not aware of the test results which showed a semen stain at the time of the arrest (2T.258). Marisch

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7/ The record indicated that the police first attempted to ascertain whether someone other than Johnson had used his car on November 20th, fourteen hours after Johnson's arrest, during interrogation (2T.932).

indicated that the police became aware of the results some time prior to taking Johnson's written statement (2T. 929-930, 958). Detective Koelliker also indicated that he was unaware of any test results seven hours after the arrest when he questioned Johnson (2T.1135-1136).

Immediately following his arrest, Johnson was taken to another gas station, at least a quarter of a mile away (3T.1263) to obtain the release of his car to the police (3T.1250). The car was subsequently towed (3T.1250) and searched at the police station (3T.1301, 1315). Johnson was taken to the police station (3T.1245) and questioned almost continuously (2T.1103, 3T.1253, 1348-1349) until 4:00 or 5:00 a.m. on November 22nd (3T.1348). The interrogation was interrupted once when Johnson was taken by police to a Lakewood address to obtain a key ring (3T.1287, 1300) which held a trunk key to Johnson's car (3T.1275) and a penknife (3T.1296).

With no more than two hours of sleep (3T.1349), nothing to eat (3T. 1356), and promises of being released (3T.1256, 1351, see also 5T.2512), Johnson made a written statement at 9:00 a.m. on November 22nd (2T.932, 3T.1255). After the statement was obtained, Johnson was not released (2T. 1111, 3T.1353), but was subjected to further questioning by another team of detectives (2T.1100-1101, 3T.1353-1354).

Evidence obtained from the searches of the car, the seizure of the key ring and the statements obtained during the

interrogation was admitted at the trial[8/] after the court denied the petitioner's motions to suppress (3T.1534-1536, 1542).

An arrest is invalid unless it is pursuant to probable cause. United States v. Watson, 423 U.S. 411, 415 (1976); Beck v. Ohio, 379 U.S. 89, 91 (1964). It is clear that the information available to the police at the moment of Johnson's arrest justified no more than a mere suspicion of the commission of any crime by Johnson, certainly not a sufficient basis to justify the arrest by Murphy and Mulhull in connection with the Hinke disappearance (3T.1249, 1254-1255).

Furthermore, evidence obtained as a result of an unlawful arrest must be suppressed unless the primary taint is sufficiently attenuated. Brown v. Illinois, 422 U.S. 590, 592 (1975); Wong Sun v. United States, 371 U.S. 471 (1963). Here, as in Brown, there was

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8/ Evidence derived from the searches of the car included testimony (4T.2216-2224, 5T.2371-2374) and State Exhibits 9-H, a blue sweatshirt (marked 3T. 1698 and received 5T.2447) and 20, 20A, 20B, photographs of the car (marked 4T.2217 and received 5T.1561, 1660-1675, 4T.1917, 1921, 2239-2243). State Exhibit 1, a penknife taken from the key ring (marked 3T.1558 and received 5T.2437). Evidence derived from the interrogations included testimony (4T.1916-1934, 2161-2168) and State Exhibit 13 and 13A, Johnson's written statement of November 22nd (marked 4T.1928 and received 5T.2448).

no intervening factor to attenuate the primary taint of the unlawful arrest, Brown v. Illinois, 422 U.S. 590, 592 (1975), nor was the arrest sufficiently distant in time to attenuate the taint. Id., at 603-604. Finally, as in Brown, the

> "[I]llegality here,..., had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledge, in their testimony, that the purpose of their action was for investigation or for questioning...' The detectives embarked upon this expedition for evidence in the hope that something might turn up." Id., at 605. (Emphasis supplied).

Here, the statements from the interrogations and physical evidence seized from Johnson's car flowed directly from - indeed, came fast on the heels - of the illegal arrest of Johnson. Accordingly, all statements of the petitioner obtained as a result of that illegal arrest should have been suppressed. Since they were not because the state courts' decisions on this question conflict with decisions of this Court, certiorari should be granted and petitioner's convictions reversed.

IV.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE WARRANTLESS SEIZURE OF PETITIONER'S AUTOMOBILE ONE QUARTER OF A MILE FROM THE PLACE OF PETITIONER'S ARREST, AND THE SUBSEQUENT WARRANTLESS SEARCHES OF THE AUTOMOBILE AND THE SEIZURES OF VARIOUS ITEMS WHICH WERE LATER INTRODUCED IN EVIDENCE.

Following John Johnson's arrest, he was taken in custody by the detectives from the Martin gas station where he worked to a Shell gas station, located at least a quarter of a mile away (3T. 1263). Prior to arresting Johnson, the detectives had determined that Johnson's automobile was parked at the Shell station (3T.1242-1243). Johnson's car was parked at the Shell station for repair of one of the windows in the car (3T.1339, see also 2T.968, 5T.2494-2495). The detectives drove to the shell station for the express purpose of seizing Johnson's car so that it could be searched (3T.1263-1264, 1266).

The detectives did not have a warrant to seize the car (3T.1251). Nor did they advise Johnson of his right to demand a warrant or to request the police not to tow the car (3T.1339). They never asked his permission to take his car (3T.1339), but simply told him they were going to tow the car (3T.1339) and thereafter the detectives ordered a police tow truck to take the car to the police pound (3T.1271).

Hours after the seizure of Johnson's car, warrantless searches of Johnson's auto were conducted by detectives at the pound during the early morning of November 22, 1975 (3T.1278, 1293, 1301) at approximately 2:00 a.m. (ibid.) and again later that morning, at approximately 9:00 a.m. (3T.1315), when a team of police from the Scientific Investigation Unit (3T.1317) searched for trace evidence of a crime of violence (3T.1313), at the request of the detective bureau (3T.1318-1319).

Among the items seized as a result of the searches was a blue sweatshirt with a minute spot of blood on it (4T. 2221-2222), taken from the trunk (3T. 1312). It was received into evidence at trial, over defense objection, as State Exhibit 9-H (5T.2447). Testimony also was offered that the search of the car revealed a small blood spot on the interior of the car (4T.2221).

It is clear that the courts below were in clear error in rejecting petitioner's arguments because the record demonstrates that none of the exceptions to the warrant requirement apply to this case.[9] Furthermore, it is certainly ture that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 433, 461 (1971).

[9] In denying the petitioner's motion, the trial court held only that the police had a right to tow and search the car, without specifying the exception to the warrant requirement (Appendix at A58, 3T.1534).

The petitioner's auto was seized at least a quarter of a mile from where he had earlier been arrested (3T.1263). In light of Chimel v. California, 395 U.S. 752, 763 (1969), which restricted a search incident to arrest to the "arrestee's person and the area 'within his immediate control'," it can hardly be asserted that the seizure here was incident to a valid arrest. See also, Coolidge v. New Hampshire, supra, 403 U.S. at 456.

As a unanimous Court held in Preston v. United States, 376 U.S. 364, 367 (1964): "Once an accused is under arrest and in custody, then a search made at another place, without warrant, is seemingly not incident to the arrest."

Moreover, the record clearly shows that, unlike the Carroll-Chambers cases,[10] police had no probable cause to believe that the auto contained evidence relating to the crime for which the car was searched.[11] The information about the car, which the police had at the time

[10] E.g., Carroll v. United States, 267 U.S. 132, 158-159 (1925); Chambers v. Maroney, 399 U.S. 42, 47-48 (1970); Cardwell v. Lewis, 417 U.S. 583, 587 (1974); Texas v. White, 423 U.S. 67, 68 (1975).

[11] Petitioner was arrested in connection with the Hinke disappearance (3T. 1255) and the searchers were looking for trace evidence of a violent crime (3T.1313, 1315), clearly not descriptive of the alleged attempted abduction of Kimberly Stephens.

of the seizure, had been, for the most part, in their possession nineteen hours earlier when the first search of Johnson's auto occurred (3T.1257-1259) and related only to the alleged attempted abduction of Kimberly Stephens, who had never been in or ever touched the car involved in that incident (3T.1258).[12] As in Preston v. United States, 376 U.S. 364, 368 (1964), and Dyke v. Taylor Implement Mfg. Co., Inc., 391 U.S. 216, 221, 222 (1968), here there was no probable cause to believe that evidence of the crime was concealed in the auto.

Further, the exception exemplified by Carroll v. United States, 267 U.S. 132 (1925), Chambers v. Maroney, 399 U.S. 42 (1970), Cardwell v. Lewis, 417 U.S. 583 (1974) and Texas v. White, 423 U.S. 67, 96 S.Ct. 304 (1975), does not apply here. Warrantless car searches were permitted in this line of cases "because circumstances which furnish probable cause to search a particular car for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable." Chambers v. Maroney, supra, 399 U.S. at 51.

12/ At the time of arrest, the officers didn't know that the towel seized from Johnson's car at midnight on November 21st was stained with semen (2T.258, 1135-1136, see also 2T.929-930). All they knew, other than information concerning Stephens, was that a towel and two pop bottles, of a different size than those possessed by the victim (2T.1001), were seized from Johnson's car.

The instant case, like Coolidge v. New Hampshire, 403 U.S. 443 (1971), furnishes none of "the exigent circumstances" noted in the Carroll-Chambers line of cases.[13] Like Coolidge, id., at 461, Johnson had not resisted the police (4T.1902) when his car had been searched nineteen hours earlier in connection with the Hinke disappearance (2T.991); the car was not being used for an illegal purpose, but was undergoing repair at a gas station (3T.1339), the location of which the police were aware well in advance of Johnson's arrest (3T.1242). There were, in short, absolutely no circumstances to avoid the warrant requirement of the Fourth Amendment. See, United States v. Chadwick, 433 U.S. 1 (1977).

Nor can the seizure of the car and subsequent searches and seizures at the police pound be justified on the basis of consent. The Ohio Court of Appeals - Eighth District contended that Johnson's alleged consent to the midnight search of his car nineteen hours earlier continued to permit the seizure of the car subsequent to his arrest. Appendix at A24. The court of appeals' analysis ignored the plain facts that Johnson was under arrest at the time of the seizure (3T.1263). When the police saw Johnson's car, they ordered a tow (3T.1271). Johnson's permission to tow the car was never requested nor received (3T.1339). Johnson was also not informed that he had a right to a warrant (id.).

13/ See, e.g., Cardwell v. Lewis, 417 U.S. 583, 596 (1974).

The burden on the prosecution of showing consent, free from intimidation and duress, Bumper v. North Carolina, 391 U.S. 543 (1968), is particularly heavy where the individual is under arrest; non-resistance to orders or suggestions does not constitute consent. Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951); United States v. Rothman, 492 F.2d 1260 (9th Cir. 1974). The record here demonstrates nothing more than mere non-resistance while in custody, clearly not the free and voluntary consent required by this Court's decisions.

Having failed to prove an exception to the general requirement of a warrant, the State's warrantless seizure of Johnson's car and the subsequent warrantless searches and seizures of the contents of the car were clearly unconstitutional and the decisions of the courts below upholding the searches and seizures were in direct conflict with decisions of this Court. Certiorari should therefore be granted to resolve this question and petitioner's convictions should be reversed.

V.

AN IMPORTANT QUESTION IS PRESENTED WHERE AN AFFIDAVIT WHICH SUPPORTED THE ISSUANCE OF A WARRANT FOR THE SEARCH OF PETITIONER'S HOME FAILED TO SET FORTH FACTS TO SHOW THE BASIS FOR A NAMED INFORMANT'S CONCLUSORY STATEMENTS WHICH WERE NECESSARY TO ANY ATTEMPTED SHOWING OF PROBABLE CAUSE.

A night search of Johnson's home

was conducted on November 22, 1975, pursuant to a warrant issued earlier that day (2T.1141-1142). Among the items seized in the search of Johnson's apartment and admitted in evidence at trial was a pair of undershorts stained with blood (4T.2251-2253) which was received as State Exhibit 8-K (5T.2446), a wash rag found to have traces of blood (4T.2255) which was received as State Exhibit 25-E (5T.2452) and numerous photographs depicting the condition of the apartment and the position of various items at the time of the search which were received as State Exhibits 25, 25-A through 25-D (5T.2452).

Detective Volk, with the aid of Assistant County Prosecutor Garver, had prepared the affidavit (Appendix at A74) in application for warrant to search Johnson's apartment (2T.1141). Everything presented to the judge in support of the application for the search warrant was contained in the affidavit (2T.1146); on the affidavit alone, the judge issued the warrant (2T.1167). The affidavit set forth in the following two paragraphs the information provided to the judge in support of probable cause:

> "Affiant states that on November 20, 1975, the Cleveland Police Department commenced an investigation into the abduction of one MELISSA HINKE upon receiving a report from MRS. JANICE HINKE that her daughter MELISSA HINKE age 8 was missing her absence being unexplained. Affiant further states that during the course of said investigation, it was learned from one MR. BOZAK

that JOHN A. JOHNSON's 1968 Buick Ohio license number 350184 red body black vinyl top, was seen at or near the area where said MELISSA HINKE was last seen and that MR. BOZAK further observed the driver of the above described vehicle attempt to abduct a young female child the same having occurred at or near the time of MELISSA HINKE's disappearance. Subsequent investigation revealed that JOHN A. JOHNSON was the owner of the above described automobile. As a result of the above information, officers of the Cleveland Police Department went to JOHN JOHNSON's address at 2006 West Blvd., at which time JOHN A. JOHNSON allowed these officers to check his car. As a result of this cursory search, 2 Pepsi bottles, 1 carton of Lawson's milk in a bag, a towel which was analysed by the scientific investigation unit and found to have semen present.

"Affiant further states, that on November 22, 1975, the partially clothed body of MELLISA HINKE was found in a wooded area of the Cleveland Metropolitan Park-North Olmsted, Ohio with numerous puncture wounds of the upper torso and bleeding from the rectal area. Affiant further states, the body of MELISSA HINKE was conveyed to the county coroner's office by the Park Rangers."

Here, as in Spinelli v. United States, 393 U.S. 410 (1969), the information supplied by Mr. Bosak, the named informant, "has a fundamental place in this warrant application. Without it, probable cause could not be established." Id. at 414.

However, there are absolutely no facts or underlying circumstances detailed from which an independent magistrate could have concluded that an attempted abduction had taken place. The magistrate was left to rely solely upon Mr. Bosak's totally unsupported conclusion that he, in fact, had witnessed an attempted abduction.

Furthermore, the affidavit failed to set forth any factual basis to support the credibility of the informant or the reliability of his information. Certainly a mere name does not supply the basis to believe the credibility of the informant. The absence of a factual detailing of the basis for either the informant's conclusory statement, or the credibility of the informant or the reliability of his information should be fatal to the question of sufficiency of this affidavit. Aguilar v. Texas, 378 U.S. 108 (1964). Here, neither of the requirements mandated in Aguilar, supra, and Spinelli v. United States, 393 U.S. 410 (1969), are met.

Furthermore, the recital in the affidavit of the items found in the search of Johnson's car is completely without significance. There are no facts to establish that the items are material or relevant to establishing probable cause to believe that Johnson committed

a crime against the person of Melissa Hinke. Although the affidavit details that the victim's bloody body was found, the stains on the towel found in Johnson's car were from semen, not blood.

Most importantly, there are absolutely no facts or conclusions whatsoever in the affidavit to support a belief that evidence of a crime would be found in John Johnson's apartment. Indeed, the only facts set forth point solely to Johnson's car.

There can be no doubt, therefore, that the decisions of the courts below are in clear conflict with the decisions of this Court. Certiorari should be granted to review this question and petitioner's convictions should be reversed.

VI.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THERE WAS SUFFICIENT PROOF THAT FALSE STATEMENTS WERE INCLUDED IN A SEARCH WARRANT AFFIDAVIT BY AN AFFIANT WITH RECKLESS DISREGARD FOR THE TRUTH SO AS TO HAVE REQUIRED THAT THE SEARCH WARRANT BE VOIDED.

The affiant, Detective Volk, testified that he had prepared the affidavit in support of the warrant to search petitioner's apartment with the aid of an assistant prosecutor (2T.1141). Volk expressly testified that he reviewed all the police reports which were available when he prepared the affidavit (2T. 1147, 1151). Volk admitted that he knew

at the time that he drafted the affidavit that the location of the attempted abduction was on Eichorn Avenue and that Melissa Hinke was last seen at West 65th near Lorain Avenue, one to one and one-half miles from the scene of the attempted abduction. Volk was also aware that the attempted abduction on Eichorn Avenue occurred at 2:30 p.m., on November 20, 1975, but that Melissa Hinke disappeared sometime after 3:00 p.m., more than one-half hour later (2T.1178). However, none of these details were included in the affidavit. Instead, it was indicated that the attempted abduction occurred "at or near" the time and place of the victim's disappearance, creating the false impression that Melissa Hinke was the victim of the attempted abduction. The statement concerning the attempted abduction was essential to the establishment of probable cause (see Appendix at A73).

Volk reasonably should have been aware, simply by the disparity in time and location, that the victim of the reported attempted abduction was not Melissa Hinke. By drafting the affidavit to create the false impression that Hinke was the victim in the Eichorn incident, Volk demonstrated a reckless disregard for the truth.

Further evidence of Volks's reckless disregard of the truth in his drafting of the affidavit was supplied by his testimony that he had no personal knowledge of the informant Mr. Bosak or the manner in which Mr. Bosak's information was related to the police (2T.1150-1151, 1165); he received all his information from sources within the police department

(2T.1163). In fact, it is clear that at the time Volk prepared and signed the affidavit, he had no factual basis for a belief that Mr. Bosak was a credible informant or that Mr. Bosak's information was reliable (2T.1163-1166). Indeed, Volk didn't even know who originally contacted the police (2T. 1165, 1166), or through how many levels of hearsay the information had gone before it trickled down to him (2T. 1166).

Volk's claim that he didn't know the child's name who was involved in the attempted abduction on Eichorn Avenue (2T.1148), can be construed as another indicator of Volk's reckless disregard for the truth. However, his testimony in this regard is simply incredible, in light of his testimony that he reviewed all the police reports which were available on November 22nd (2T.1147, 1151) and also obtained information from other detectives (2T.1150). Newspaper articles published on the afternoon of November 22nd carried details of the attempted abduction and clearly indicated that a child other than Melissa Hinke had been involved (see, M. B. 3,4). Furthermore, Detective Murphy, a participant in the search with Detective Volk (2T.1141), testified that there were several reports on the alleged attempted abduction on Eichorn Avenue which were available on the afternoon of November 21st and Murphy had been able to review them at that time (3T.1241).

Franks v. Delaware, ____ U.S. ____, 98 S.Ct. 2674 (1978), clearly mandates that where a defendant establishes at an evidentiary hearing on the veracity

of statements in the affidavit that the affiant included false statements in an affidavit, either knowingly and intentionally, or with reckless disregard for the truth, and the false statement is essential to establish probable cause, the Fourth Amendment considerations require the voiding of the search warrant.

On the facts presented here, the lower courts' failures to follow the teaching of Franks denied petitioner his Fourth and Fourteenth Amendment rights and this Court should grant review and reverse petitioner's convictions.

VII.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF HIS PRIVILEGE TO REMAIN SILENT WHERE PETITIONER WAS SUBJECTED TO A LENGTHY, CONTINUOUS, NIGHT-TIME, CUSTODIAL INTERROGATION PRIOR TO MAKING ORAL AND WRITTEN STATEMENTS.

From the time of John Johnson's arrest at about 7:00 p.m. on November 21, 1975, until late the following morning, Johnson was, with few interruptions, subjected to incessant custodial interrogations by rotating teams of detectives (see, e.g., 3T.1245-1248, 1252-1253, 1272, 1293, 1342-1343, 2T.953, 1133, 4T.2315).

At 2:00 a.m., on November 22, 1975, Detectives Koelliker and Leppelmeier of the Homicide Unit began to question the appellant (2T.953, 1133). Although Koelliker asserted that Johnson was read his constitutional rights (2T.1130),

there was no signed writing, or any other record, which indicated that Johnson had been informed of his rights and had decided to speak to the detectives (2T.1132). Petitioner denied that Koelliker or Leppelmeier ever advised him of his rights (3T.1347).

Koelliker also claimed that Johnson was advised that he was being questioned in connection with the suspected murder of Melissa Hinke (2T.1134), even though, Koelliker agreed, the police had no knowledge that the girl had been murdered (2T.1134), and his written report did not mention any such advice to Johnson (2T.1135). Johnson did not remember being asked any questions about Melissa Hinke (3T.1347). He stated that he was questioned about his activities and whereabouts on November 20th (3T. 1347).

After two or three hours of questioning by Koelliker and Leppelmeier during the course of which Johnson was forced to strip naked (4T.2168), the interrogation ceased (3T.1348). Petitioner was taken to an occupied cell (3T.1349) at five or six o'clock a.m. (3T.1348). Johnson could not sleep because of the men milling around (3T.1349). There was no mattress, so he tried to sleep on the floor (3T.1409).

At approximately 8:00 a.m., Johnson was brought to an interview room (3T. 1248, 1349). Detectives Murphy and Marisch were present (2T.923, 3T.1249, 1279). Johnson testified that Murphy again told him that as soon as he made a statement he would be released (3T. 1351). This testimony was never refuted

and, in fact, was partially corroborated by Murphy who admitted that he earlier had stated that Johnson would be released as soon as he made a statement (3T.1256).

Johnson testified that he was not advised of the purpose of the statement (3T.1352, 1353, see also 2T.930). Johnson testified that he asked for an attorney but was told he did not need one because as soon as he was finished, he would be released (3T.1350). Detective Mulhull also had informed the petitioner's wife the previous evening that no attorney was needed and he would advise her when one was needed (3T.1282-1283, 5T.2504).

Although police suspect statements are headed by a paragraph setting forth the suspect's constitutional rights (2T.956), Johnson's written statement contained no such paragraph (2T.956). The absence was explained by Detective Marisch's blatant denial that Johnson had been arrested or that he was even a suspect in the Hinke case (2T.935, 3T. 1303), even though Murphy and Mulhull testified that they had arrested Johnson (3T.1256-1257), Johnson was booked in connection with the arrest in connection with the disappearance of Melissa Hinke by Marisch himself (2T.950), and the caption on the written statement indicated that it was in regard to the victim's disappearance (2T.942). In spite of these facts Marisch stated that Johnson was asked to make only a witness statement. Marisch admitted that witnesses are not advised of their rights prior to taking statements (2T. 957), but claimed that this time the petitioner was advised of his rights, orally, because of the "severity of the

matter" (2T.956-957),[14] a contradiction of the claim that Johnson wasn't even a suspect. Johnson did not remember ever being advised of his rights prior to the taking of the written statement (3T. 1353).

At trial, testimony was received from Detectives Koelliker (4T.2163-2167) and Marisch (4T.1929-1935) concerning the details of the whereabouts statements which Johnson made during the interrogation at 2:00 a.m. and 9:00 a.m. on November 22, 1975. The introduction of both statements of November 22nd allowed the prosecution to offer witnesses to destroy, point by point, the time which Johnson's statements indicated he spent at certain locations on November 20, 1975.

The oral statement was taken after Johnson had been questioned for almost seven hours (2T.1103, 3T.1253, 1348-1349). The written statement was obtained after Johnson had been allowed no more than two hours sleep (3T.1349), and nothing to eat since his arrest thirteen hours before (3T.1356). It is clear that:

> "[w]hatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not readily waive his rights. In these circumstances, the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." Miranda v. Arizona, 384 U.S. 436, at 476 (1966) (emphasis supplied).

The Ohio Court of Appeals explained its rejection of petitioner's argument on this issue partially on the basis that "the challenged statements...were in substance consistently exculpatory" (Appendix at A15). However, this Court has expressly stated that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis supplied). Furthermore, Miranda makes clear that the State bears the burden of showing that a defendant has made a voluntary, knowing, and intelligent waiver of the privilege to remain silent. Id. at 475-479. But the Ohio Court of Appeals applied solely the voluntariness of consent analysis, set forth in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), when it overruled petitioner's assertion of error.

In light of the clear failure of the Ohio courts to apply the correct

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[14] At trial, Marisch testified that prior to taking the written statement, he only asked Johnson "if he recalled his rights" (4T.1926).

standards to the claimed waiver of petitioner's privilege to remain silent, and the compelling facts of this case, this Court should grant certiorari and reverse the convictions.

VIII.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHERE, WHILE PETITIONER WAS BEING SUBJECTED TO LENGTHY, CONTINUOUS, CUSTODIAL INTERROGATION, THE INTERROGATING OFFICERS TOOK AFFIRMATIVE STEPS TO PERSUADE PETITIONER'S WIFE NOT TO SECURE COUNSEL FOR PETITIONER.

John Johnson was arrested for questioning in connection with the disappearance of Melissa Hinke (3T.1254-1255) and was continuously interrogated from the time of his arrest at 7:00 p.m. until the following morning (see, e.g., 3T.1245-1248, 1252-1253, 1272, 1293, 1342-1343). His wife went to the police station and met with detectives who were questioning Johnson (3T.1282-1283, 4T. 2504, 4T.2552). Detective Mulhull admitted that he told Mrs. Johnson that an attorney wasn't needed and that he would advise her when an attorney was needed (3T.1282-1283). Mulhull's testimony was corroborated by Mrs. Johnson (5T.2504). Detective Murphy testified that he advised Johnson's wife on the night of Johnson's arrest that as soon as Johnson made a statement, Johnson would be released (3T.1256, 5T.2512-2513).

Although Johnson was clearly arrested and booked in connection with the

disappearance of Melissa Hinke (3T.1256-1257, 2T.950), and although the continuous interrogation belies any claim that Johnson was a mere witness, detectives attempted to put Mrs. Johnson at ease concerning the need for an attorney. Their actions demonstrate a determination to prevent the one person who would have been able to contact an attorney from doing so. Their action is in direct conflict with the policies enunciated in Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964), to afford a suspect, who is the focus of a police investigation, the assistance of counsel. Both Miranda and Escobedo recognize that unfettered access to counsel is absolutely necessary to enable a suspect to fully protect his privilege to remain silent. The record in this case demonstrates that the police used the considerable pressure of isolation, continual interrogation and fatigue to wrest statements from the petitioner which could later be used to convict him. This Court should grant certiorari in order to address the important question presented here.

IX.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE USE AT TRIAL OF A STATEMENT WHICH WAS OBTAINED AFTER INDICTMENT, IN THE ABSENCE OF COUNSEL AND AFTER PETITIONER HAD CLEARLY REFUSED TO MAKE ANY STATEMENT WITHOUT THE PRESENCE OF HIS ATTORNEY.

The petitioner was indicted on November 25, 1975, and arraigned on

November 28, 1975. Immediately after the arraignment, Johnson was rushed from the courtroom by Detectives Comodeca and Terpay to the interview room in the police station (2T.1086) for the purpose of further interrogation (2T.1077) as well as viewing for possible identification (2T.1092, 1093). Comodeca and Ferris were aware that following the arraignment, two attorneys were to be appointed to represent the petitioner (2T.1093, 1075). In spite of the imminent appointment of new counsel to represent the petitioner, Comodeca proceeded with the interrogation (2T.1087).

Detective Ferris entered the room between 10:30 and 11:00 a.m. (2T.1088, 1092). Both Ferris and Comodeca claimed that petitioner asked to talk to Ferris alone (2T.1077, 1088), but Johnson testified that Ferris came into the room and asked Comodeca if Ferris could talk to Johnson alone (3T.1360). Johnson stated that Ferris told him that everything could be "off the record" and that they didn't have to even talk about the case (3T.1361). Comodeca twice entered the room during the conversation between Ferris and Johnson (2T.1088, 1099). Although Comodeca claimed that Johnson made statements in his presence (2T. 1089), Johnson denied doing so (3T.1363), and the trial court so found (3T.1536-1538, Appendix at A60-61). Johnson testified that each time Comodeca entered the room, Ferris asked if Comodeca could listen to what was off the record, but he refused and requested an attorney before making any statements (3T.1362-1363). Ferris offered no testimony concerning Comodeca's return to the room.

Despite claims that Johnson was advised of his rights (2T.1067) and had waived them (2T.1068), Ferris admitted that on several occasions during the time they talked, Johnson stated that he would not make any statement without his attorney present (2T.1078), and that this refusal was not limited to written statements (2T. 1079). Johnson specificially denied that Ferris advised him of his rights (3T.1406), and maintained that Ferris said the conversation was "off the record" (3T.1362).

At 2:00 p.m., when the petitioner's appointed attorneys arrived, the conversation between Ferris and the petitioner ended. Ferris denied telling the petitioner's attorneys that it was a shame they had shown up, because "I would have gotten more out of him" (2T.1080). However, when Detective Comodeca was asked if he heard such a statement, he testified, "I don't know how to word it,...there was some--I can't recall" (2T.1098).

Police confiscated a grey sweatshirt (3T.1324) which had been brought from home by Johnson's wife (3T.1326) after Johnson indicated to Ferris that he had worn the sweatshirt on November 20th, the day of the victim's disappearance (3T.1324, 1372). The grey sweatshirt, found to have traces of blood on it, was subsequently marked (5T.2415) and received (5T.2455) in evidence as State Exhibit 32.

At trial, Ferris offered extensive testimony of Johnson's statements of November 28th (5T.2408-2416). The testimony included several highly incriminating statements allegedly made

by Johnson, including the statement that he was never in a fight that day but made up the story (5T.2411), that the sweatshirt he wore on November 20th was muddy and had blood on it from the waist to the chest and on the sleeves (5T. 2416) and that "when he took his trousers off, he saw his shorts were full of blood, and...he thought of the little girl" (5T.2409). Full text of this statement appears in Appendix at A63.

In Massiah v. United States, 377 U.S. 201 (1964), authorities surreptitiously elicited incriminating statements from a defendant in counsel's absence, after the defendant had been indicted for the crime to which the statement pertained. The Supreme Court held:

> "[T]he petitioner was denied the basic protection (of the right to assistance of counsel) when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." Ibid., 377 U.S. at 206.

Accord, McLeod v. Ohio, 381 U.S. 356 (1965).

Recently, this Court affirmed the teaching of Massiah in Brewer v. Williams, ____ U.S. ____, 97 S.Ct. 1232 (1977). In Brewer, this Court noted that Williams' statements that he would talk after he consulted with his attorney "were the clearest expressions...that he desired the presence of an attorney before any

interrogation took place," ____ U.S. ____, 97 S.Ct. at 1242. In the instant case, no clearer expression of the desired presence of an attorney could have been made by the petitioner when he stated several times (as admitted by Detective Ferris) that he didn't want to make any statement without an attorney present (2T.1078-1079).

This Court should grant certiorari and should reverse petitioner's convictions.

X.

AN IMPORTANT QUESTION IS PRESENTED CONCERNING ENFORCEMENT OF THE RULE ESTABLISHED IN MIRANDA V. ARIZONA THAT WHERE AN INDIVIDUAL INDICATES THAT HE WANTS AN ATTORNEY, THE INTERROGATION MUST CEASE UNTIL THE ATTORNEY IS PRESENT.

The record in this case is clear that on November 28, 1975, John Johnson requested to consult with an attorney before making any statements. Detective Ferris specifically admitted that several times during his questioning of Johnson on November 28, 1975, Johnson told Ferris that Johnson didn't want to make any statement without an attorney present (2T.1078-1079). The State produced no evidence to rebut this testimony; indeed, it could not.

The record shows that the interrogation of Johnson by Ferris lasted from two (2) to two and one-half (2 1/2) hours (2T.1079, 1088, 1092) and that Johnson's first request for an attorney would have

occurred just fifteen (15) minutes after the interrogation had begun, when Detective Comodeca entered the room (2T.1088). It is clear that Ferris should have immediately ceased the interrogation after Johnson made his desire for an attorney apparent.

Miranda v. Arizona, 384 U.S. 436 (1966), unequivocally dictates that the State must either immediately honor a request for the assistance of counsel or refrain from further questioning until counsel is obtained:

> "If an individual states that he wants an attorney, the interrogation must cease until an attorney is present." 348 U.S. at 474 (Emphasis supplied).

This Court's decision in Michigan v. Mosley, 423 U.S. 96 (1975), leaves little doubt that the rule enunciated in Miranda enjoys continued vitality. See Mosley, supra, fn. 7 and 10.

Petitioner urges this Court to grant certiorari to consider the clear and compelling facts of this question and to reverse his conviction.

XI.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE ADMISSION OF TESTIMONY CONCERNING THE IN-COURT AND PRETRIAL, POST-INDICTMENT IDENTIFICATIONS OF THE PETITIONER WHEN THE PRETRIAL IDENTIFICATION OCCURRED IN THE ABSENCE OF PETITIONER'S ATTORNEYS.

On November 28, 1975, three days after petitioner Johnson had been indicted and on the same day of his arraignment, twelve-year-old Lisa Chambers was escorted by police to a room in the Cleveland police station where she was asked to look through a two-way mirror and identify John Johnson (2T.847, 892), in the absence of counsel for Johnson (2T.892-893, 1093). Lisa earlier had told detectives investigating the Hinke case about an incident which occurred on November 14th where a man had tried to entice her into his car by offering her a ride to school (2T.882).

Before viewing Johnson, detectives told Lisa that Johnson had tried to get another girl into his car and that he had already been identified by other children (2T.864-866). When Lisa looked through the mirror she saw a number of men she knew were detectives and uniformed police in the room (2T.862, 4T.1817). Johnson,

dressed in prison clothes (2T.862-863) and the only person who was not a police officer (ibid.), was seated in the room, surrounded by the older men (4T.1811).

At trial the State offered Lisa's testimony to prove an alleged prior act by Johnson pursuant to Ohio Revised Code §2945.59 (Appendix at A82) to prove Johnson's motive, intent, scheme, plan, etc. Lisa testified at trial about her police-station identification of Johnson as the man who offered her the ride (4T.1809-1810) and also made an in-court identification of Johnson (4T.1807-1809). Lisa's mother was also permitted to testify and buttress Lisa's pretrial identification of Johnson (4T.1825).

The introduction of testimony concerning the identifications denied petitioner his Sixth and Fourteenth Amendment rights. However, the courts below completely failed to address the obvious trial court error even though it was specifically brought to their attention (see e.g. Appendix at A45, 50). This Court has recently reaffirmed its holding in Gilbert v. California, 388 U.S. 263 (1967), that trial testimony concerning a pretrial identification, held in the absence of counsel, after the initiation of adversary judicial criminal proceedings, is subject to a per se exclusionary rule. Moore v. Illinois, ____ U.S. ____, 98 S.Ct. 458 (1978). Here, Lisa Chambers' testimony about the pretrial identification clearly should have been excluded.

Moreover, the in-court identification of Johnson by Lisa in light of the post-indictment identification was subject to the rule enunciated in United States v. Wade, 388 U.S. 218 (1967). The State completely failed to prove "by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." United States v. Wade, supra, at 240.

Furthermore, the unnecessary suggestiveness of the pretrial identification procedure created a substantial likelihood of irreparable misidentification in violation of petitioner's due process rights under the Fourteenth Amendment. Manson v. Brathwaite, 432 U.S. 98 (1977). Petitioner urges this Court to accept review and correct the obvious and serious prejudicial error left unremedied by the courts below. This Court should grant certiorari and reverse petitioner's convictions.

CONCLUSION

This case arises out of ugly beginnings--a brutal and senseless death of a young child. It is a case in which the cry for vengeance is a natural response to the outrage of a frightened community and the frustrations implicit in society's continuing struggle to control criminal conduct.

It is precisely in such cases as this, however, that the interposition of constitutional protections and orderly process are most needed--and most sorely

tested. And so it is vital that each sordid case in which the provocation is mighty and the public outcry vast and unremitting--including this one--must evoke the most dispassionate analysis and thoughtful response of those charged with administering our system of criminal justice. For, "not the least significant test of the quality of a civilizations is its treatment of those charged with... offenses which arouse the passions of a community." Frankfurter, J., concurring in Irvin v. Dowd, 366 U.S. 717, 729 (1961).

Petitioner has demonstrated that from his first contact with police officers through his trial and sentencing, the protections of the law and the constitution guaranteed to all citizens were denied him. He was illegally arrested. His home and car were illegally ransacked by police. He was illegally detained and illegally interrogated. He was forced to stand trial in a community atmosphere in which the newspapers and television, and everyone exposed to them, were passionately conviced of his guilt and anxious for vengeance, before a juror was sworn or a word of testimony taken, and in a courtroom in which the poisonous effects of such publicity, on judge and jury, were readily apparent.

It remains for this Court to apply the rule of law to this case. Petitioner, therefore, respectfully urges this Court

to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Case No. 78-1573

JOHN JOHNSON,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Section 2945.59, Ohio Revised Code.....	A82

SUPREME COURT OF THE UNITED STATES

No. A-737

John Johnson,

Petitioner

v.

Ohio

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari to the above-entitled cause be, and the same is hereby, extended to and including April 14, 1979.

/S/ Potter Stewart
Associate Justice of
the Supreme Court of
the United States

Dated this 15th
day of February, 1979

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,	)	1978 Term
City of Columbus.	)	To wit: December 4, 1978
State of Ohio, Appellee,	)	
vs.	)	No. 78-510
John Johnson, Appellant.	)	REHEARING

It is ordered by the court that rehearing in this case is denied.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	)	1978 Term
City of Columbus.	)	To wit: November 9, 1978
State of Ohio, Appellee,	)	No. 78-510
vs.	)	APPEAL FROM THE COURT OF APPEALS
John Johnson, Appellant.	)	for Cuyahoga County

This Cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 36618

STATE OF OHIO,

Appellee

APPEAL FROM
COMMON PLEAS COURT
No. 23071-Cr.

-vs-

JOHN JOHNSON,

Appellant

JOURNAL ENTRY
AND OPINION

DATE: Jan. 30, 1978
STILLMAN, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Melissa Hinke, eight years old, was kidnapped, raped and murdered on November 20, 1975.

On that date, at approximately 2:35 p.m., another eight-year-old child named Kimberly Stephens was walking across an alley at West 52nd Street and Eichorn when she encountered a man in a car. He called to her, "Come here, little girl". Kimberly recalled that the man had dark hair, a moustache and glasses, and that the car in which he was seated was a red Buick with a black vinyl top. Kimberly

ran home. A nearby beverage store owner, Charles Bosak, witnessed the man's attempt to induce Kimberly Stephens into his car and, his suspicions aroused, noted the license number of the car. His wife promptly notified the police of the incident.

At approximately 3 p.m., an eleven-year-old, Mari Nettgen, was walking to a candy store located at West 51st Street and Clark when a red car approached her. The man seated within the car offered Miss Nettgen one dollar if she would tell him where ThomasJefferson High School was. Miss Nettgen described the man as wearing blue tinted glasses and sporting a moustache.

At approximately 3:30 p.m., Melissa Hinke was walking down West 67th Street towards the Lawson's store located at Lorain and West 67th Street with two empty quart Pepsi Cola bottles and some change with which to buy milk. Miss Hinke never returned home from her errand; her dead body was discovered two days later by a young boy in a wooded area of the Cleveland Metropolitan Park's Rocky River Reservation.

Near the end of the day on November 20, 1975, at approximately 11 p.m., several police officers went to defendant-appellant John Johnson's apartment on West Boulevard where they observed a red Buick with a black vinyl top and the same license number as the Buick reported by Mr. Bosak earlier that day in connection with the attempted abduction of Kimberly Stephens. The police peered into the car and saw two empty Pepsi bottles and a carton of Lawson's milk in

a paper bag. The police then proceeded to Johnson's apartment where they knocked upon the door. Johnson was awakened by the knock and answered it. According to the testimony of the police, Johnson invited them into the apartment and subsequently gave them permission to search his car. The two empty Pepsi Cola bottles were removed from Johnson's car as well as a towel which was determined on November 21, 1975, to have semen stains on it.

On November 21, 1975, after further investigation and after the stains on the towel had been analyzed, the police decided to question Johnson. At approximately 7:15 p.m., two police officers placed Johnson under arrest at the gas station where he was working. They also advised Johnson of his rights. Johnson's car, which was being repaired in a Shell station about one-half mile away from the gas station where he worked, was towed and impounded in the police station downtown. After a lie detector test was administered to Johnson, he was booked. The police officers testified that Johnson gave permission to search his car again. At or about 2:30 a.m. to 4:30 a.m., November 22, 1975, Johnson was taken to jail. The alleged intention of the police at this time was to take a written statement from Johnson and release him in the morning. Some four hours after the questioning was terminated, three police officers took Johnson from his jail cell and completed a release slip for his release from custody. In addition, Johnson made a written witness statement which detailed his whereabouts on November 20, 1975. However, shortly prior to Johnson's

scheduled release, the Homicide Department took charge of the case and rearrested, photographed and searched him. Johnson's clothes were also removed and confiscated by the police at this time. His car was inventoried and processed for fingerprints at the impound garage.

At about 10 a.m., November 22, 1975, a sixteen-year-old boy discovered the partially clothed body of Melissa Hinke with multiple stab wounds on the upper torso and rectal area. Johnson's apartment was searched pursuant to a search warrant and, among other things, bloody rags and bloody undershorts were found. On November 25, 1975, Johnson's car was searched again pursuant to a search warrant. The search revealed three burrs, a hair sample, a doll, and some wet rags. Between November 22, 1975, and November 28, 1975, several victims of attempted abductions were interviewed, including Kimberly Stevens, Lisa Chambers, Debra Main and Diane Lawson, all of whom identified the photograph of Johnson as someone who "looked like" their assailant. Further, Kimberly Stevens positively identified Johnson's photograph on November 22, 1975. Although Lisa Chambers was not 100 percent sure that the photograph of Johnson was the picture of the man who had accosted her, she did recognize Johnson at the police headquarters where she viewed him through a two-way mirror on November 28, 1975. At the time she saw him, he was dressed in prison clothes and was in a room with other policemen and detectives. On that same day, Johnson made an oral statement to Detective Ferris in which he admitted that the sweatshirt that he wore when

he arrived home on November 20, 1975, was "muddy and bloody". Ferris asked Johnson to make a written statement, but Johnson refused to make one in the absence of his attorneys. All oral statements made by Johnson after declining to make a written statement without his attorney were suppressed at trial.

Johnson testified in his own behalf only at the motion hearings and repeatedly denied that he had been read or informed of his rights. Moreover, he claimed that he was led to believe that he would be released if he made a statement and that he understood his oral declarations made to Detective Ferris to be off the record. Johnson also insisted that he never gave the police permission to search his car on the night of November 20, 1975.

On November 25, 1975, Johnson was indicted for the kidnapping, rape, and aggravated murder with specifications of Melissa Hinke. He was arraigned on November 28, 1975 and pled "not guilty". Johnson withdrew his "not guilty" plea and entered a plea of "not guilty by reason of insanity" on February 18, 1976. Voir dire of the jury began on February 23, 1976, and the jury selection was completed on February 24, 1976. The trial commenced the latter part of the day on February 24, 1976, and continued until March 5, 1976, at which time Johnson was found guilty as charged. On May 20, 1976, Johnson was sentenced to death for aggravated murder with specifications, and sentenced to seven to twenty-five years for kidnapping and rape, both sentences to be served consecutively. Johnson's notice of appeal was filed on June 14, 1976, and he assigns the following

errors:

"I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR CHANGE OF VENUE OR CONTINUANCE TO DISSIPATE THE EFFECTS OF PREJUDICIAL PRETRIAL PUBLICITY.

"II. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE STATEMENTS OBTAINED FROM THE APPELLANT IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS ON NOVEMBER 22 and 28, 1975.

"III. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE DERIVED FROM THE FOLLOWING SEARCHES AND SEIZURES, ALL OF WHICH WERE VIOLATIVE OF THE APPELLANT'S FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS:

"A. The November 21, 1975, Warrantless Search of the Appellant's Automobile and Seizure of Certain Items Found Inside.

"B. The Warrantless Arrest of the Appellant Without Probable Cause.

"C. The Warrantless Seizure of the Appellant's Automobile After His Arrest on November 21, 1975, and the Subsequent Searches of the Automobile.

"D. The Warrantless Seizure on November 22, 1975, of

the Appellant's Trunk Keys and Penknife.

"E. The Search of the Appellant's Apartment Pursuant to a Warrant on November 22, 1975.

"F. The Search of the Appellant's Automobile Pursuant to a Warrant on November 24, 1975.

"IV. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF ALLEGED PRIOR ACTS OF THE APPELLANT, FOR THE FOLLOWING REASONS:

"A. The Evidence Was Not Admissible Under Revised Code Section 2945.59.

"B. With Respect to Two of the Alleged Prior Acts, Identification of the Appellant as the Person Involved was Insufficient.

"C. Alleged Prior Acts Testimony Was Introduced Before the State Established a a Prima Facie Case.

"V. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING THE APPELLANT'S ACTIVITIES IN AN ADULT BOOK STORE.

"VI. THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY THAT APPELLANT HAD THE BURDEN OF PROVING THE DEFENSE OF INSANITY BY A PREPONDERANCE OF THE EVIDENCE.

"VII. THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY UNDER A CONSTITUTIONALLY DEFECTIVE STATUTORY SCHEME."

This case, in essence, presents a double trial for the court's consideration. Much of the argument offered by the appellant in his assignments of error relates to proceedings covering three full days of testimony in considering critical motions. There were considered by the court prior to the impaneling of a jury and the subsequent trial.

I. The first assignment of error charges that the trial court erred in denying a motion for change of venue or for a continuance to dissipate the effects of prejudicial pretrial publicity.

To sustain this assignment of error, the appellant urges that the pervasive pretrial publicity of a "prejudicial, hostile and incriminating kind" precluded the impaneling of a jury free of bias. We find this allegation of error to be unfounded. Of the original jury panel, fourteen were dismissed for cause. The defense exhausted its six peremptory challenges, although the prosecution did not. The process of impaneling the jury consumed two days and a supplemental array was not found necessary to complete the process of impaneling the jury.

In Murphy v. Florida (1975), 421 U.S. 794, the United States Supreme Court held that the exposure of prospective jurors to news accounts of an alleged crime do not presumptively deprive the defendant of due process. The exposure must be analyzed in relation to all the circumstances to determine the primary issue,

the fairness of the trial. The court called attention to the voir dire in the Murphy case, addressed to assuring the seating of a jury who constituted "a panel of impartial, 'indifferent' jurors". See Irvin v. Dowd (1961), 366 U.S. 717, 722. It is not, however, required that jurors be totally ignorant of the facts and issues involved in a case to qualify them as fair and impartial jurors. Murphy, supra, at 800.

In the instant case, there was a searching voir dire of the prospective jury panel by the trial judge as well as counsel for both the appellant and the state. In addition to this lengthy interrogation, when a question was raised as to the possible exposure of jurors to prejudicial overnight publicity which occurred during the impaneling process, the court authorized and supervised the conducting of an intensive personal, individual examination of each juror in chambers to ascertain the effect of such publicity upon each prospective juror.

In Nebraska Press Ass'n v. Stuart (1976), 427 U.S. 539, the United States Supreme Court held that the Sixth Amendment guarantee of "trial by an impartial jury" is so basic to our system of law that it must be protected by every possible effort. However, the court also declared that "pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial". Id., at 565.

The procedure followed in the instant case assured a fair trial.

For these reasons, we hold that the first assignment of error challenging the local venue of the trial and demanding a continuance has not been sustained within the factual or legal context before us. We, therefore, overrule this assignment of error.

II. The second assignment of error asserts that the trial court committed error in refusing to suppress statements elicited from the appellant in "violation of his Fourth, Fifth, Sixth and Fourteenth Amendment Rights on November 22 and 28, 1975."

The Amendments cited by the appellant declare in pertinent part:

"AMENDMENT [IV]

"[SEARCHES AND SEIZURES]

"The right of the poeple to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"AMENDMENT[V]

"[RIGHTS OF PERSONS]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"AMENDMENT [VI]

"[RIGHTS OF ACCUSED]

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

"AMENDMENT [XIV]

"[RIGHTS OF CITIZENS]

"§1 All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The first of the allegations in this assignment of error relates to statements elicited from the appellant on November 22, 1975. The appellant argues that the statements violated his right against self-incrimination. It is claimed that the appellant was exhausted at the time of his arrest on November 21, 1975, and that he was exposed to continuous police interrogation thereafter until the statements were made. Appellant asserts, therefore, that his statements were involuntary.

We recognize the appellant's complaint, but do not find factual or legal warrant for his conclusions in the testimony presented in this case. Although there is conflicting testimony, it is evident that the challenged statements offered by the appellant were in substance consistently exculpatory. Statements which were made by the appellant at the time of his initial interrogation were directed to the issue of his possible appearance as a witness, rather than as a suspect in the case. They were voluntary.

In Schneckloth v. Bustamonte (1973), 412 U.S. 218, the Supreme Court addressed the basic problems encompassed by this second assignment of error. The issue of voluntariness in making a statement is inextricably involved with the knowledge of the individual that he may remain silent if he chooses. The Schneckloth case declares that the police questioning of a suspect must be viewed in context.

The Court said:

"In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224; his lack of education, e.g., Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed. 2d 975; or his low intelligence, e.g., Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed. 2d 246; the lack of advice to the accused of his constitutional rights, e.g., Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; the length of detention, e.g., Chambers v. Florida, supra; the repeated and prolonged nature of the questioning, e.g., Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; and the use of physical punishment such as the deprivation of food or

sleep, e.g., Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948. In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. Culombe v. Connecticut, supra, 367 U.S., at 603, 81 S.Ct., at 1879.

"The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. See Miranda v. Arizona, 384 U.S. 436, 508, 86 S.Ct. 1602, 1645, 16 L.Ed.2d 694 (Harlan, J., dissenting); id., at 534-535, 86 S.Ct., at 1659-1660 (White, J., dissenting). In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative. See, e.g., Davis v. North Carolina, supra; Haynes v. Washington, supra, 373 U.S. at 510-511, 83 S.Ct., at 1341-1342;

Columbe v. Connecticut, supra, 367 U.S., at 610, 81 S.Ct., at 1883; Turner v. Pennsylvania, 338 U.S. 62, 64, 69 S.Ct. 1352, 93 L.Ed. 1810." Id., at 226-227.

Viewed in the light of Schneckloth, the instant case presents a set of facts in which the appellant repeatedly volunteered statements which were denials of his participation in the alleged crime and were in no sense admissions of guilt. Even accepting the appellant's assertion that he was misled by an early promise of release from custody or that legal counsel was not necessary at the stage of investigation then in progress, it cannot be asserted that the exculpatory statements elicited from him were prejudicial to the presentation of his defense.

The only statement injurious to his cause was made to Detective Ferris, and this statement was clearly volunteered by the appellant. The evidence demonstrates that Johnson, the appellant, requested other officers to leave the interrogation room while he spoke privately at his own volition to Detective Ferris.

The appellant also asserts that he wished to consult counsel at various indefinite times during his questioning. This has been denied by the state, citing the fact that he did have a lawyer, Michael Toth, at a very early stage of the proceedings. Moreover, there is substantial testimony that the appellant was repeatedly advised of his

Miranda rights, but that he nevertheless spoke freely to the interrogating officers until they were requested by his court-appointed counsel to desist from further questioning. The transcript makes it clear that the appellant spoke without major reservations to the officers throughout the interrogation because he was consistently denying implication in the crime. This was true on November 28, 1975 as well as on November 22, 1975.

For these reasons, therefore, we find that the court below did not violate the appellant's constitutional rights in refusing to suppress the voluntary statements made by the appellant.

III. The third assignment of error charges that the trial court erred in admitting evidence derived from searches, seizures and the arrest of the appellant in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution.

The first charge in the sequence of events questioned by the appellant objects to the search of the appellant's automobile in the early morning hours of November 21, 1975 without a warrant. We reject this assignment of error because the appellant consented to the search, lead the officers to his car without objection, and opened the car doors which he declared to have no operating locks.

The assertion by the appellant that he was responding to an unwarranted show of police force in performing these acts would lead to a legally untenable conclusion. This has been set forth logically and cogently in People v. Michael (1955), 45 Cal. 2d 751.

There the Court said:

> "It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority." Id. at 754.

In the circumstances present here, we are unable to discern any evidence of coercion or threat by the interrogating officers at the time of the requested automobile search. Nor was there any evidence of implied threat, coercion or compulsion at any further stage of the proceedings. The conflicting evidence with respect to advice of counsel as well as other Miranda rights, Miranda v. Arizona (1966), 384 U.S. 436, permitted the trial court considering the motions to determine as a matter of credibility that the appellant had been properly appraised of his constitutional rights by several officers at several times. In fact, when he was initially taken into custody in the early morning hours of November 22, 1975, the appellant himself indicated that he had been so advised. The court, at the conclusion of the appellant's testimony with respect to the lengthy series of motions, addressed him directly as follows:

> "Mr. Johnson, on the statement you gave on the 22nd of November, was this question asked of you and did you give this answer, 'When you were arrested, were you advised of your constitutional rights, and did you understand them?'
>
> "'Answer: Yes.'"

To this question by the court, the appellant responded:

> "I don't know whether I gave that answer or not, but if it is there, and I signed it." (Tr. 1417).

In addition to this testimony, the appellant was questioned on his statement with respect to the search of his car and home as follows:

> "'Did you give permission to the detectives of the Cleveland Police Department to search your car and home for any part of the clothing belonging to Melissa Hinke?'"
>
> * * *
>
> "Yes, I did give permission." (Tr. 1387).

These statements, although the appellant sought to question their specificity, remain in the record as stong indications of the effort by the investigation officers to comply with the requirements of Miranda.

The important aspect of the evidence as it emerged here is anticipated in

Schneckloth, supra, at 229:

> "The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searched. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.'"

The appellant's challenge to the warrantless search of his automobile and the seizure of various items found in the course of the search is therefore overruled.

A second objection contained within the third assignment of error charges

that the appellant was arrested without probable cause and without a warrant.

The circumstances leading to the arrest of the appellant were clearly within the provisions of R.C. 2935.03. This provides in pertinent part that:

> "When there is reasonable ground to believe that an offense of violence...has been committed, a... police officer may arrest without a warrant any person whom he has reasonable cause to believe is guilty of the violation...."

In the instant case, the court heard evidence that someone answering the description of the appellant had attempted to abduct a child other than Melissa Hinke within a half mile distance from the site of Melissa Hinke's disappearance on the same afternoon. There was sufficient reason to believe that the automobile whose license number had been provided to the investigating officers and which was listed to the appellant, had been involved in the prior attempted abduction. Under these circumstances, the rule established in State v. Fultz (1968), 13 Ohio St. 2d 79, is applicable. The court held in Syllabus 1:

> "To have probable cause to arrest without a warrant an officer must have sufficient information from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused."

Under the circumstances of the case, there was probable cause for the appellant's arrest.

For this reason, we overrule the appellant's assignment of error relating to his arrest without a warrant.

The third objection raised by the appellant within the third assignment of error challenges the seizure of his automobile after his arrest on November 22, 1975, and the subsequent searches of the automobile.

In view of the evidence establishing that the original search of the car was consensual, this argument is less than persuasive. The appellant not only permitted the officers to view both the exterior and the interior of his car, but also subsequently provided them with keys necessary for its operation and with a key required to open the trunk. Clearly, he had no objection to either the seizure or the search of the vehicle. The voluntariness standards prescribed by Schneckloth, supra, apply with equal validity here.

The fourth objection cited by the appellant to the seizure of the trunk keys and penknife on November 22, 1975, must fail for similar reasons.

The key and penknife were on the same key ring and were turned over by a coworker of the appellant with the appellant's voluntary consent to the investigating officers.

For this reason, we reject this allegation of error.

The fifth section of the appellant's third assignment of error challenges the search of the appellant's apartment

pursuant to a warrant issued on November 22, 1975. Objection is made to the contents of the warrant and to the admission of evidentiary items obtained as a result of its execution.

It would be a straining of judicial credulity to hold that the affidavit supporting the warrant alleging 1) the murder of a missing child, 2) the search of an automobile bearing license plates listed to the appellant, 3) the discovery of a towel in the vehicle found to have semen thereon, 4) the discovery of the body of the missing girl in the Cleveland Metropolitan Park North Olmsted area, and 5) the necessity for an early search of the residential premises occupied by the appellant, would not be sufficient to justify a warrant here. The challenge to Mr. Charles Bosak's information, providing the license number of appellant's vehicle in association with an apparently attempted abduction in the nearby vicinity and attacking his credibility as a "hearsay conclusion" does not accord with the affidavit statement concerning a witnessed attempted abduction.

We, therefore, hold that the warrant issuance requirements of Aguilar v. Texas (1964), 378 U.S. 108, have been satisfactorily met. The issuing magistrate who authorized the search warrant may do so on hearsay information provided that he is informed of some of the underlying circumstances on which the informant based his conclusions, and the circumstances from which the officer seeking the warrant determined the validity of the information. We find that these requirements were met in the affidavit

executed by the issuing magistrate, and therefore, overrule this objection.

The final challenge under the series of objections relating to search and seizure argues that the search of the appellant's automobile pursuant to a warrant issued on November 24, 1975, was invalid.

This warrant was issued upon an affidavit composed of three pages reciting in detail virtually all of the information available to the Homicide Unit of the Cleveland Police Department on the date of its execution. It articulates more than enough data to justify the issuance of a search warrant under the tests prescribed by the Supreme Court. The officer who sought the warrant related his long years of experience, and listed the specific items believed to be contained in the automobile registered to the appellant and impounded at that time at the Cleveland Police Department Impound Unit. The issuing magistrate reading the affidavit could clearly find the tests prescribed by Aguilar, supra, to be more than satisfactorily met. We hold that he did so.

We, therefore, overrule this assignment of error.

IV. The fourth assignment of error charges that the trial court committed error in permitting the prosecution to introduce evidence of alleged prior acts of the appellant.

R.C. 2945.59 provides:

"Proof of defendant's motive.

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

It should be emphasized in analyzing this provision of the Code that the question of a defendant's intent may be evidenced by a showing that he has performed similar acts prior to the acts which are the subject matter of the alleged offense. The appellant has sought to interpret the statute as narrowly requiring such evidence to be virtually identical with the acts charged in the principal case. The kidnapping of Melissa Hinke was, of course, a primary incident in the set of circumstances which eventuated in a rape and murder. R.C. 2945.59 is in essence an evidentiary statute, State v. Pigott (1964), 1 Ohio App. 2d 22. The production of evidence relating to a similar occurrence, namely overtures strongly suggestive of a child kidnapping becomes a matter of evidentiary relevance. In analyzing the argument of the appellant relating to this assignment of error,

the determination in State v. Carter (1971), 26 Ohio St. 2d 79, becomes significant. The court held there in Syllabus 1:

> "Where evidence, tending to prove the commission of a similar act by an accused, is offered by the state under R.C. 2945.59, it is not necessary for the state to establish the identity of the accused as the perpetrator of the similar act by proof beyond a reasonable doubt."

Syllabus 2:

> "In such case, it is sufficient for the admission of such evidence that it offers substantial proof that the alleged similar act was committed by the defendant."

In an earlier opinion, State v. Shively (1961), 172 Ohio St. 128, 131, the court admitted evidence of "alleged unusual circumstances" occurring near the defendant's home as indicative of immoral or strange conduct.

In the instant case, the testimony being challenged related to a prior occurrence in the near vicinity of Melissa Hinke's disappearance, and on the very date, and within a short time preceding her disappearance. Earlier that afternoon, the evidence demonstrated that someone sought to induce Kimberly Stevens to enter an automobile bearing the appellant's license number. This was at a time when the evidence indicated that the appellant was the driver of the vehicle. The state contends that this was not a "similar act", but was part of a continuous course of conduct by the appellant. We do not place major emphasis upon this distinction,

but hold that the evidence was admissible under the statute.

Evidence was also offered with respect to a similar act involving Mari Nettgen on November 20, 1975, and another act involving Lisa Chambers on November 14, 1975.

These three episodes were accepted by the court as similar acts within the purview of R.C. 2945.59, but two others of a comparable nature were rejected as evidence because the court did not evaluate them as sufficiently probative to warrant their consideration.

The instances which were accepted into evidence were those in which the appellant sought to entice school children into his car on their way to or from school. Obviously enough, such acts could not necessarily be regarded as identical to acts which occurred with respect to Melissa Hinke. We do not know the precise nature of these acts. Nevertheless, each of these acts represented a potential prelude to a violent occurrence of the kind which befell Melissa Hinke.

The court carefully instructed the jury on the limitations which are properly to be placed on such evidence, and this restraint upon the jury served to confine the consideration of this testimony to its proper boundaries.

Hence, appellant's argument regarding similar acts is rejected.

A secondary consideration involved in the fourth assignment of error relates

to the identification of the appellant as the person involved in these occurrences and the appellant asserts that this identification was insufficient.

Under the law outlined in State v. Carter, supra, the requirement for proof of identity in these circumstances is "substantial" rather than beyond a reasonable doubt.

The combined testimony of Kimberly Stevens, Mari Nettgen and Charles Bosak established a substantial measure of evidentiary proof. Although Bosak did not see the driver clearly, his attention was so markedly directed to the episode in which the driver attempted to entice Kimberly Stevens into his car that it prompted him to memorize and write down the license number of the vehicle at once. Kimberly Stevens did not identify the appellant in court, but she described the vehicle clearly. (Tr. 646, 651, 658). Mari Nettgen identified the appellant at the motion hearing and the trial in chief. (Tr. 815, 1782).

Lisa Chambers identified the appellant (Tr. 850, 1808), and also identified his automobile as the car used in her attempted pickup on November 14, 1975. This identification was made at the Impound Lot of the Cleveland Police Department. (Tr. 1810).

These questions of identification have been challenged not only for their alleged insufficiency by the appellant, but also because they were allegedly introduced before the state had established a prima facie case.

The state must establish a prima facie case before introducing evidence of similar acts. State v. DeRighter (1945), 145 Ohio St. 552. The alleged effort to entice Kimberly Stevens into the appellant's vehicle took place at approximately 3 p.m. on November 20, 1975. This was unsuccessful because the child ran away. The conduct charged by the prosecution with respect to Melissa Hinke followed immediately thereafter. This was sufficient to establish a prima facie case for the introduction of evidence of a similar act with respect to Lisa Chambers.

For this reason, we hold that the testimony was properly admitted in this sequence and that the defendant was in no way prejudiced by this procedure.

V. The fifth assignment of error charges that the trial court erred in admitting testimony concerning the appellant's activities in an adult bookstore on November 20, 1975.

The appellant contends that the evidence of the appellant's presence at a pornographic bookstore on the date of the alleged occurrence was prejudicial. We do not agree.

The evidence establishes part of the time period and activities of the appellant on the date of the alleged offense. His whereabouts at about 5:30 p.m. of that date are matters in issue. They are outside of the context of similar acts contemplated in R.C. 2945.59, but they are admissible to demonstrate the continuity of activities indulged in by the appellant on November 20, 1975.

We find no prejudice to the appellant in their admission, and therefore, overrule this assignment of error.

VI. Assignment of error number six asserts that the trial court committed plain error in instructing the jury that the appellant had the burden of proving the affirmative defense of insanity by a preponderance of the evidence. The appellant relies upon State v. Robinson (1976), 47 Ohio St. 103, and its interpretation of R.C. 2901.05(A). That case requires that where a defendant has asserted an affirmative defense, he must go forward with evidence of a nature sufficient to raise the defense, but is not required to prove the existence of such defense by a preponderance of the evidence as provided in R.C. 2901.05 (A)(1974).

This Robinson ruling has been interpreted by the Supreme Court in subsequent cases which also raised the affirmative defense burden issue. State v. Williams (1977), 51 Ohio St. 112, and State v. Humphries (1977), 51 Ohio St. 95. In Humphries, as in the instant case, the trial court incorrectly instructed the jury that the defendant had the burden of persuasion in proving the affirmative defense of insanity by a preponderance of the evidence. The Court of Appeals for Franklin County in that case held that the defendant, by failing to object to the jury instruction, had waived the error on appeal. The Supreme Court of Ohio affirmed the Court of Appeals and declined to reverse a conviction for aggravated murder, grand theft, aggravated burglary and rape. The court said at 103:

> "Notwithstanding that the trial court in State v. Humphries, case No. 76-1150, incorrectly instructed the jury that the defendant has the burden of persuasion in proving the affirmative defense of insanity, the Court of Appeals for Franklin County correctly held that the defendant, by failing to object to the jury instruction, waived the error on appeal...."

In the Humphries case, this error was assigned at the appellate level as it is here. We have already found Humphries dispositive of this issue.

This Court of Appeals has recently decided the site of State v. Edwards (8th Dist., Dec. 1, 1977), Case No. 36641. In this case, the affirmative defense of self-defense was asserted and the court charged improperly as to the burden of persuasion under R.C. 2901.05(A) and State v. Robinson, supra. However, the defendant failed to object prior to the retirement of the jury. We cited Crim. R. 30 in this context.

Crim. R. 30 provides in part:

> "A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection...."

The same circumstances obtained in the instant case. The instruction offered

to the jury was erroneous under the R.C. 2901.05(A) interpretation provided in Robinson, but no objection was made prior to jury retirement. In Edwards, and in the trials of Williams and Humphries, precisely as in the instant case, the court acted prior to the Ohio Supreme Court's decision in Robinson, but subsequent to the enactment of R.C. 2901.05(A). We are bound by the Supreme Court's determination.

For this reason, we overrule the sixth assignment of error.

VII. The seventh assignment of error declares that the trial court erred in imposing the death penalty under a constitutionally defective statutory scheme.

The Ohio Supreme Court has addressed this issue specifically in State v. Bayless (1976), 48 Ohio St. 2d 73. It is unnecessary to recapitulate the reasoning of the unanimous Ohio Supreme Court in sustaining the constitutionality of the legislation which was adopted by the Ohio General Assembly following the decision in Furman v. Georgia (1972), 408 U.S. 238. A prescribed system for the determination of cases involving the death penalty has been established by Ohio statute. It is directly addressed to the infirmities which were present in the death penalty statutes of Louisiana and North Carolina. Statutes in Georgia, Florida and Texas relating to the death penalty were upheld by the United States Supreme Court, and in the judgment of the Supreme Court of Ohio, the statutory scheme now established by R.C. 2929.02, 2929.03 and 2929.04 is "basically similar to the Georgia, Florida and Texas statutes

which the Court [United States Supreme Court] found to be constitutional." State v. Bayless, supra, at 83. In view of the rulings of the Ohio State Supreme Court, we find that all three of the objections raised in the seventh assignment of error are in substance governed by the Bayless case. (See also State v. Black (1976), 48 Ohio St. 2d 262, State v. Bell (1976), 48 Ohio St. 2d 270, and State v. Woods (1976), 48 Ohio St. 2d 127). In all of these cases, the issues of due process and equal protection were addressed by the court. It has now been determined by the Ohio Supreme Court that the Ohio death penalty provisions, as now operative, are constitutional.

For the reasons stated, therefore, we find none of the assignments of error to be valid, and accordingly affirm.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JOURNALIZED FEB 21 1978
GERALD E. FUERST, Clerk of Courts
By /s/Peggy Moguel Deputy

KRENZLER, P.J.,

STILLMAN, J.,

WASSERMAN, J.*, CONCUR
(*Wasserman, J., retired of the 8th Appellate District, SAUL J. STILLMAN sitting by assignment.)

/s/Saul G. Stillman
Judge

For plaintiff-appellee: John T. Corrigan

For defendant-appellant: Ralph Sperli, Bernard Berkman

EXCERPTS FROM APPLICATION FOR REHEARING TO THE OHIO COURT OF APPEALS EIGHTH DISTRICT

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee	)	CASE NO. 36618
-vs-	)	MOTION FOR RECONSIDERATION
JOHN JOHNSON, Defendant-Appellant	)	

* * *

MEMORANDUM

Appellant John Johnson has moved this Court to reconsider its decision of January 30, 1978, which overruled all of the assignments of error asserted by the appellant and affirmed the sentence and judgment rendered by the Common Pleas Court. In overruling the assignments of error asserted by the appellant, this Court has misapplied the controlling law to the facts set forth in the official record of this case and has failed to consider all of the errors assigned and briefed by the appellant, as prescribed by Rule 12(A) of the Ohio Rules of Appellate Procedure.

I. As the first assignment of error, appellant asserted that the trial court erred in denying the appellant's motion for change of venue or continuance to dissipate the effects of prejudicial pre-trial publicity. In overruling this assignment of error, the Court relied principally upon Murphy v. Florida, 421 U.S. 794 (1975). The Supreme Court stated in that decision that, upon the facts presented in that case, the jurors' exposure to publicity had to be viewed from the totality of the circumstances. 421 U.S. at 799. The Supreme Court distinguished the facts in Murphy from those presented in Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); and Irvin v. Dowd, 366 U.S. 717 (1961), where the Court reasoned that a change of venue or continuance is constitutionally compelled when there is a reasonable likelihood that prejudicial publicity will prevent a fair trial.

The facts presented in Murphy are easily distinguishable from those presented here. The Court emphasized in Murphy that most of the jurors had only a vague recollection of any publicity concerning the accused. 421 U.S. at 800. Furthermore, the Court stated that it is necessary to "distinguish between mere familiarity with [the accused] or his past [as in Murphy] and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory." Murphy v. Florida, supra, 421 U.S. at 800, n. 4 (see, also, 421 U.S. at 802).

In the instant case, all but one of the jury panel who were questioned admitted exposure to the massive publicity surrounding the case. Moreover, the jurors were not probed during voir dire to reveal the full effect of publicity. The trial judge consistently posed leading questions which elicited premature statements of the ability to be impartial (see, e.g., 1T. 42-44, 47-50, 62). Significantly, in Murphy, the Court remarked that the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights...." Murphy v. Florida, supra, 421 U.S. at 800.

The record in this case abundantly documents the inaccurate, invidious and inflammatory publicity which enveloped the community and prevented a fair trial for the appellant. Accordingly, the Court should reconsider its decision and reverse and remand.

II. The second assignment of error asserts that the trial court erred by not suppressing statements obtained from the appellant on November 22 and 28, 1975, in violation of his Fourth, Fifth, Sixth and Fourteenth Amendment rights. This Court overruled the assigned error and found that the statements were "exculpatory" and "voluntary". The Court asserts that Schneckloth v. Bustamonte, 412 U.S. 218 (1973) governs in this situation. However, Schneckloth presented a question of the voluntariness of a consent to search and the Supreme Court expressly limited its holding to a question of "consent" and expressly distinguished its holding from the rule of law applicable to those situations where rights to a fair trial were involved, such as a waiver

of counsel before making statements to police. Schneckloth v. Bustamonte, 412 U.S. 218, 235-246 (1973).

The State bears the burden of showing that a defendant has made a voluntary, knowing and intelligent waiver of the privilege to remain silent. State v. Jones, 37 Ohio St. 2d 21, 25 (1974). Furthermore, the Supreme Court expressly stated that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966)(Emphasis added).

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not readily waive his rights. In these circumstances, the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." Miranda v. Arizona, supra, at 476 (Emphasis added).

The Court states that the record shows appellant spoke "without major reservation" throughout interrogation because he was consistently denying

implication in the crime. However, the Court has failed to apply the rule enunciated in State v. Jones, supra, 37 Ohio St. 2d at 26-27:

> "If a defendant subsequently acts in such a way as to reasonably alert an interrogating officer that the warning given may have been misapprehended, the officer must, before any further questioning, insure that the defendant fully and correctly understands his Fifth Amendment rights."

The record is replete with evidence showing that the appellant was misled and that he misunderstood his rights, assuming that he was informed of them. The Court should reverse and remand.

The Court has failed to address the asserted errors that the statements were the fruit of an illegal arrest and that the post-indictment statement violated the rule enunciated in Massiah v. United States, 377 U.S. 201 (1964) and reaffirmed in Brewer v. Williams, ____U.S.____, 97 S.Ct. 1232 (1977).

III. The third assignment of error specified that the trial court erred in admitting evidence derived from six distinct searches and seizures in violation of the appellant's Fourth, Fifth and Fourteenth Amendment rights.

This Court found no error concerning the search of the appellant's car on November 21, 1975, even though the record clearly shows that the appellant, small in stature, was awakened, after midnight, by

four armed, uniformed police who announced they were on official business. There was no evidence that the appellant was advised of his right to refuse or his right to counsel at this juncture in his contact with the police, contrary to the assertion by this Court. In fact, evidence showed he was not advised of his right to demand a warrant (2T. 997). The appellant was arrested at least nineteen hours after the midnight search, and his answers in the written statement concerning being informed of his rights referred solely to the time of arrest.

Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973) mandates consideration of the "vulnerable subjective state" of the individual who has allegedly consented. Moreover, courts must be especially alert for coercion, express or implied, no matter how subtle. Id., at 228. The State's burden of proving consent cannot be satisfied by showing mere acquiescence to a claim of authority. Bumper v. North Carolina, 391 U.S. 543 (1968); City of Lakewood v. Smith, 1 Ohio St. 2d 128, 205 N.E. 2d 388 (1965). On the facts presented in this record, the State clearly failed to meet its burden to show consent.

The Court overruled the assertion of error concerning the warrantless arrest of the appellant on November 21, 1975, on the basis that there was probable cause to believe that the appellant had been involved in an attempted abduction of another child. However, the evidence is clear that the man Mr. Bosak saw at the "attempted abduction" had a beard. The appellant did not have a beard. Furthermore, the record reveals no effort by the

police to determine if someone else was driving the appellant's car until long after the appellant was arrested. At the time of arrest, the facts may have supported suspicion but certainly not probable cause to justify the appellant's arrest in connection with the disappearance of Melissa Hinke. The State had the burden to show probable cause for the warrantless arrest and the record is devoid of sufficient evidence to meet that burden.

The Court overruled the assigned errors concerning the seizure of the appellant's car following his arrest and the seizure of the trunk keys and penknife because of voluntary consent. The Court has based its finding of consent upon the alleged consent which was obtained to search the appellant's car nineteen hours before the appellant's arrest. The Ohio Supreme Court rejected a similar argument of continuing consent, upon facts much less compelling, in City of Lakewood v. Smith, 1 Ohio St. 2d 128, 205 N.E. 2d 388 (1965). Moreover, it is well recognized that the burden on the prosecution of showing consent, free from intimidation and duress, is particularly heavy where the individual is under arrest. Non-resistance to orders or suggestions does not constitute consent. Judd v. United States, 190 F. 2d 649, 651 (D.C. Cir. 1951); United States v. Rothman, 492 F. 2d 1260 (9th Cir. 1974). The record here demonstrates nothing more than mere non-resistance while in custody. Accordingly, the State has not met the burden of proof.

Assigned errors concerning the search of appellant's apartment on November 22, 1975 and the search of his car on

November 24, 1975, pursuant to warrants, also were overruled by the Court. The Court concluded that "the challenge to Mr. Charles Bosak's information, providing the license number of appellant's vehicle in association with an apparently attempted abduction in the nearby vicinity and attacking his credibility as a 'hearsay conclusion' does not accord with the affidavit statement concerning a witnessed attempted abduction."

The affidavit provides only that "it was learned from one Mr. Bosak that John A. Johnson's 1968 Buick, Ohio license number 350184, red body black vinyl top, was seen at or near the area where said Melissa Hinke was last seen and that Mr. Bosak further observed the driver of the above described vehicle attempt to abduct a young female child the same having occurred at or near the time of Melissa Hinke's disappearance."

There are absolutely no facts or underlying circumstances detailed from which an independent magistrate could conclude that an attempted abduction had taken place. The magistrate is left to rely solely upon Mr. Bosak's totally unsupported conclusion that he had witnessed an attempted abduction.

In State v. Gill, 49 Ohio St. 2d 177, 179 (1977), the Court recently reaffirmed that affidavits "must, in order to insure that magistrates determine probable cause for themselves, incorporate 'a substantial basis for crediting the hearsay.' [T]hat 'substantial basis' must include (1) information about the facts upon which the informant based his allegations of criminal activity, and (2) 'some of the underlying

circumstances from which the officer concluded that the informant was credible or his information reliable'." (Citations omitted). The affidavit in this case satisfies neither of the two prongs of the requirement for issuance of a valid warrant. State v. Gill, supra, requires that the assigned error be upheld and that this Court reverse and remand. For similar reasons, the warrant for the search of the car must also fail because of bald, uncorroborated conclusions contained in the affidavit.

The Court has failed to discuss the error asserted concerning the invalidity of the warrants because the affidavits contain knowing false statements, or recklessly asserted material statements which are false. United States v. Luna, 525 F. 2d 4, 8 (6th Cir. 1975), cert. denied, ____U.S.____, 96 S.Ct. 1459 (1976).

IV. The appellant, in his fourth assignment of error, asserted that the trial court erred in admitting evidence of alleged prior acts of the appellant for three separate and distinct reasons. However, in overruling the fourth assignment of error, this Court failed to address the specifically briefed error that Lisa Chambers' identification of the appellant was obtained in a constitutionally defective manner under the rules of law established in United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Foster v. California, 394 U.S. 440 (1969).

* * *

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

State of Ohio — Court of Appeals No. 36618

Appellee

-vs- — Lower Court No. C.P. 23071 Cr.

John Johnson — Motion No. 39410

Appellant

Date Feb. 21, 1978

JOURNAL ENTRY

Motion by appellant for reconsideration overruled. Exc.

STILLMAN, P.J.,

KRANZLER, J.,

WASSERMAN, J., CONCUR
Wasserman, J., retired
sitting by assignment.

/s/ Saul G. Stillman
SAUL G. STILLMAN

BOOK 83 PAGE 452 VOL 318 PG 230

PROPOSITIONS OF LAW PRESENTED IN MEMORANDUM IN SUPPORT OF JURISDICTION TO THE SUPREME COURT OF OHIO

Proposition of Law No. I:

A CHANGE OF VENUE OR A CONTINUANCE IS REQUIRED WHERE THE REASONABLE LIKELIHOOD THAT PREJUDICIAL PRETRIAL PUBLICITY WILL PREVENT A FAIR TRIAL HAS BEEN SHOWN BY AFFIRMATIVE PROOF OF THE PREJUDICIAL PUBLICITY AND BY THE VOIR DIRE EXAMINATION OF THE JURY.

Proposition of Law No. II:

THE INTRODUCTION INTO EVIDENCE OF STATEMENTS OF THE DEFENDANT OBTAINED WHILE IN POLICE CUSTODY, IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, REQUIRES A REVERSAL OF THE DEFENDANT'S CONVICTIONS.

Proposition of Law No. II(A):

THE INTRODUCTION INTO EVIDENCE OF STATEMENTS OF THE DEFENDANT OBTAINED WHILE IN POLICE CUSTODY ON NOVEMBER 22, 1975, WITHOUT HAVING BEEN ADVISED OF HIS CONSTITUTIONAL RIGHTS, OR HAVING UNDERSTOOD THEM, REQUIRES REVERSAL OF HIS CONVICTIONS BECAUSE OF THE DENIAL OF DEFENDANT'S RIGHT AGAINST SELF INCRIMINATION.

Proposition of Law No. II(B):

THE INTRODUCTION INTO EVIDENCE OF STATEMENTS OF THE DEFENDANT OBTAINED

WHILE IN POLICE CUSTODY ON NOVEMBER 22, 1975, REQUIRES REVERSAL OF HIS CONVICTIONS WHERE DEFENDANT'S REQUEST FOR AN ATTORNEY WAS REFUSED.

Proposition of Law No. II(C):

THE INTRODUCTION INTO EVIDENCE OF STATEMENTS OF THE DEFENDANT OBTAINED WHILE IN POLICE CUSTODY FOLLOWING AN ILLEGAL ARREST DENIED DEFENDANT HIS FOURTH AMENDMENT RIGHTS AND A REVERSAL OF HIS CONVICTION IS REQUIRED.

Proposition of Law No. II(D):

THE INTRODUCTION INTO EVIDENCE OF AN ORAL STATEMENT OF THE DEFENDANT ELICITED DURING A POLICE CUSTODIAL INTERROGATION ON NOVEMBER 28, 1975, REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTIONS WHERE THE DEFENDANT'S REQUEST TO CONSULT WITH AN ATTORNEY WAS REFUSED.

Proposition of Law No. II(E):

THE INTRODUCTION INTO EVIDENCE OF AN ORAL STATEMENT OF THE DEFENDANT ELICITED DURING A POLICE CUSTODIAL INTERROGATION ON NOVEMBER 28, 1975, AFTER THE DEFENDANT HAD BEEN INDICTED AND IN THE ABSENCE OF COUNSEL, REQUIRES A REVERSAL OF DEFENDANT'S CONVICTIONS.

Proposition of Law No. III:

THE INTRODUCTION OF EVIDENCE DERIVED FROM SEARCHES, SEIZURES AND THE ARREST OF THE DEFENDANT, ALL OF WHICH WERE VIOLATIVE OF THE APPELLANT'S FOURTH, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS, REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

Proposition of Law No. III(A):

THE INTRODUCTION OF EVIDENCE DERIVED FROM THE NOVEMBER 21, 1975, WARRANTLESS SEARCH OF THE APPELLANT'S AUTOMOBILE AND SEIZURE OF CERTAIN ITEMS FOUND INSIDE REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTION WHERE CONSENT WAS THE ONLY JUSTIFICATION PROFFERED BY THE STATE AND THE RECORD DEMONSTRATES NO MORE THAN MERE ACQUIESCENCE TO AUTHORITY.

Proposition of Law No. III(B):

THE INTRODUCTION OF EVIDENCE DIRECTLY DERIVED FROM THE WARRANTLESS ARREST OF THE DEFENDANT WITHOUT PROBABLE CAUSE REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

Proposition of Law No. III(C):

THE INTRODUCTION OF EVIDENCE DERIVED FROM THE WARRANTLESS SEIZURE OF DEFENDANT'S AUTOMOBILE AFTER HIS ARREST AND THE SUBSEQUENT SEARCHES OF THE AUTOMOBILE VIOLATED DEFENDANT'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS AND REQUIRE REVERSAL OF HIS CONVICTIONS.

Proposition of Law No. III(D):

THE INTRODUCTION INTO EVIDENCE OF DEFENDANT'S PENKNIFE WHICH HAD BEEN SEIZED WITHOUT A WARRANT ON NOVEMBER 22, 1975, WITH DEFENDANT'S TRUNK KEYS REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS WHERE THE ITEMS WERE SEIZED WITHOUT CONSENT OF THE DEFENDANT, IN VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

Proposition of Law No. III(E):

THE INTRODUCTION OF EVIDENCE SEIZED DURING A SEARCH OF THE DEFENDANT'S APARTMENT PURSUANT TO WARRANT ON NOVEMBER 22, 1975, REQUIRES REVERSAL WHERE THERE WAS NO PROBABLE CAUSE FOR THE ISSUANCE OF THE WARRANT AND THE AFFIDAVIT IN SUPPORT OF THE WARRANT CONTAINED KNOWN FALSE STATEMENTS OR RECKLESSLY ASSERTED MATERIAL STATEMENTS WHICH WERE FALSE.

Proposition of Law No. III(F):

THE INTRODUCTION OF EVIDENCE SEIZED DURING A SEARCH OF THE DEFENDANT'S AUTOMOBILE PURSUANT TO A WARRANT ON NOVEMBER 24, 1975, REQUIRES THE REVERSAL OF THE DEFENDANT'S CONVICTIONS WHERE THERE WAS NO PROBABLE CAUSE FOR THE ISSUANCE OF THE WARRANT, THE AFFIDAVIT IN SUPPORT OF THE WARRANT CONTAINED KNOWN FALSE STATEMENTS OR RECKLESSLY ASSERTED MATERIAL STATEMENTS WHICH WERE FALSE, AND INFORMATION WHICH WAS OBTAINED FROM AN ILLEGAL SEARCH AND SEIZURE.

* * *

Proposition of Law No. IV(C):

THE INTRODUCTION OF EVIDENCE OF AN ALLEGED PRIOR ACT REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTIONS WHERE THE IN-COURT AND OUT OF COURT IDENTIFICATIONS OF THE DEFENDANT WERE OBTAINED IN A CONSTITUTIONALLY DEFECTIVE MANNER.

ASSIGNMENT OF ERRORS TO THE OHIO COURT OF APPEALS - EIGHTH DISTRICT

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR CHANGE OF VENUE OR CONTINUANCE TO DISSIPATE THE EFFECTS OF PREJUDICIAL PRETRIAL PUBLICITY.

II. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE STATEMENTS OBTAINED FROM THE APPELLANT IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS ON NOVEMBER 22 AND 28, 1975.

III. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE DERIVED FROM THE FOLLOWING SEARCHES AND SEIZURES, ALL OF WHICH WERE VIOLATIVE OF THE APPELLANT'S FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS:

A. The November 21, 1975, Warrantless Search of the Appellant's Automobile and Seizure of Certain Items Found Inside.

B. The Warrantless Arrest of the Appellant Without Probable Cause.

C. The Warrantless Seizure of the Appellant's Automobile After His Arrest on November 21, 1975, and the Subsequent Searches of the Aubomobile.

D. The Warrantless Seizure on November 22, 1975, of the Appellant's Trunk Keys and Penknife.

E. The Search of the Appellant's Apartment Pursuant to a Warrant on November 22, 1975.

F. The Search of the Appellant's Automobile Pursuant to a Warrant on November 24, 1975.

IV. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF ALLEGED PRIOR ACTS OF THE APPELLANT, FOR THE FOLLOWING REASONS:

A. The Evidence Was Not Admissible Under Revised Code Section 2945.59.

B. With Respect to Two of the Alleged Prior Acts, Identification of the Appellant as the Person Involved was Insufficient.

C. Alleged Prior Acts Testimony Was Introduced Before the State Established a Prima Facie Case.

V. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING THE APPELLANT'S ACTIVITIES IN AN ADULT BOOK STORE.

VI. THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY THAT APPELLANT HAD THE BURDEN OF PROVING THE DEFENSE OF INSANITY BY A PREPONDERANCE OF THE EVIDENCE.

VII. THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY UNDER A CONSTITUTIONALLY DEFECTIVE STATUTORY SCHEME.

STATE OF OHIO) ss.
Cyyahoga County)

IN THE COURT OF COMMON PLEAS
May Term, 1976
To-wit: May 20, 1976

STATE OF OHIO	)	No. CR-23071
Plaintiff	)	
	)	INDICTMENT
vs.	)	Kidnapping w/ct
	)	Rape w/ct Aggr.
John A. Johnson	)	Murder with
Defendant	)	Specifications

JOURNAL ENTRY

Now comes the Prosecuting Attorney on behalf of the State and defendant, John A. Johnson was brought into Court, represented by counsel.

Defendant, on a former day of Court, having been found guilty by a Jury of Kidnapping, RC. 2905.01, first count, Guilty of Rape, RC. 2907.02, second count, and Guilty of Aggravated Murder, RC. 2903.01, with Specifications #1, and #2, guilty of Aggravated Murder during a Kidnapping and during a Rape, as charged in the third count of the indictment, was this day inquired of if he had anything to say why judgment should not be pronounced against him and he having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced.

It is therefore, ordered and adjudged by the Court that you, John A. Johnson, be taken from the bar of this Court to the Jail of this County, thence

within thirty (30) days by the Sheriff of this County be taken to the Chillicothe Correctional Institution, Chillicothe, Ohio, and that the said Sheriff there deliver you to the Warden of the Southern Ohio Correctional Facility, Lucasville, Ohio, and that you be Kept in the said Southern Ohio Correctional Facility, and that on the 20th day of November, 1976, before the hour of Sunrise of said day, and in accordance with the law and within the walls of said Southern Ohio Correctional Facility at Lucasville, Ohio, the Warden or Deputy Warden of said Southern Ohio Correctional Facility, shall cause a current of electricity to pass through your body and that the application of such current of electricity be continued until you, John A. Johnson are dead, pursuant to the third count of the indictment, RC. 2903.01, according to law. It is further ordered by the Court that John A. Johnson be imprisoned and confined for a period of seven (7) to twenty-five (25) years, as to the first count, RC. 2905.01, and for a period of seven (7) to twenty-five (25) years, as to the second count of the indictment, RC. 2907.02, all according to law. Counts to run consecutive.

Transcript ordered at State's expense.

Francis E. Sweeney, Judge

va 5/21

/s/ Francis E. Sweeney
Judge

STATE OF OHIO) ss.
Cuyahoga County)

IN THE COURT OF COMMON PLEAS
January Term, 1976
To-Wit: Feb. 28, 1976

STATE OF OHIO	)	No. CR 23071
Plaintiff	)	
	)	
vs.	)	INDICTMENT
	)	Kidnapping w/cts
John A. Johnson	)	
Defendant	)	

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and defendant John A. Johnson was brought into Court, represented by counsel.

Jury trial in progress.

Motions to Suppress are overruled.

On trial.

Opening statements and production of evidence thru witnesses.

Judge Francis E. Sweeney

rg 3/9/76

Judge /s/ F. Sweeney

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STATE OF OHIO) ss.
Cuyahoga County)

IN THE COURT OF COMMON PLEAS
January Term, 1976
To-Wit: Feb. 25, 1976

STATE OF OHIO	)	No. CR 23071
Plaintiff	)	
	)	INDICTMENT
vs.	)	Kidnapping w/cts
	)	
John A. Johnson	)	
Defendant	)	

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and Defendant, John A. Johnson was brought into Court represented by Counsel. Jury Trial.

Hearing on defendant's Motions. On trial.

Motion for Change of Venue is overruled.

Motion for Continuance is overruled.

Motion to Dismiss the Jury panel is overruled.

Judge Francis E. Sweeney

rg 3/4/76

Judge /s/ F. Sweeney

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EXCERPTS FROM OFFICIAL TRANSCRIPT OF PROCEEDINGS - STATE V. JOHN JOHNSON, CUYAHOGA COUNTY COMMON PLEAS COURT - RULINGS ON PRETRIAL MOTIONS - TRANSCRIPT PAGES 1533 - 1538

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(SATURDAY MORNING SESSION, FEBRUARY 28, 1976.)

(Thereupon further proceedings were had in the absence of the jury as follows:)

THE COURT: Now, the Court has made a determination over the evening hours on all the Motions to Suppress and all other Motions filed by the defense in this case and the Court will rule on them.

MR. CAIN: Your Honor, is it necessary that the defendant be present?

THE COURT: I thought he was here. Why isn't he here?

All right. The Court has heard the testimony over a four day period on Motions to Suppress and heard all the evidence the prosecution has, has weighed all the evidence together with the determination of the credibility of the witnesses on the evidence and the Court rules in the following manner:

Motion to Suppress, Search and Seizure of items from defendant's automobile at around 12:15 A.M., November 21st, the Court overruled. The defendant knowingly and intelligently consented

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and the items may be admitted in evidence.

The section motion as to Search and Seizure with warrant on or about the 22nd of November, 1975, is overruled. The Court finds there was adequate statement of probable cause in the attached affidavit to cause the Judge to sign the warrant and subsequent search and seizure was lawful and properly executed.

Three, Motion to Suppress Search and Seizure of car with warrant is overruled.

The Court finds there was an adequate statement of probable cause in the attached affidavit because the Judge signed the warrant and the subsequent search and seizure was lawful and properly executed.

Four, Motion to Suppress keys and attached knife is overruled. The Court finds the defendant knowingly consented to obtain keys prior to his-- rather, the police obtained possession of keys and knife with knowledge and consent of the defendant.

Five, Motion to Declare Tow of the defendant's car after an illegal arrest is overruled. The police had the right to tow and secure and search the defendant's car and my ruling is that

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it was not illegal. The Motion to Suppress Oral Statements that is on

November 25, 1975, and at 2:00 A.M., and at 10:00 A.M., on 11-22-75, is overruled.

The Court finds the defendant was advised of all his constitutional rights. The defendant then demonstrated and indicated he understood his rights knowingly and intelligently.

The Motion to Suppress the written statement approximately 11-22-75 is overruled. The Court finds the defendant, prior to written statement was advised of his rights fully and he intelligently and knowingly agreed to give a written statement and indicated the facts and he was given his rights in the statement and the Court finds prior to the defendant being advised of his rights before taking this written statement he had been given his rights, constitutional rights on at least two other occasions prior to the time and this statement was not a product of a promise or threat by any detective of the Cleveland Police Department.

The Motion to Suppress Oral Statements as given Detective Ferris on 11-28-75, at approximately 11:00 A.M., to 1:00 P.M. is overruled. The Court

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finds the defendant requested to talk to Detective Ferris alone on that morning.

The Court finds the defendant was again advised of his constitutional rights, that he understood these rights and knowingly and intelligently and voluntarily talked to Detective Ferris.

The evidence shows the defendant refused to reduce what he said to writing and requested to see an attorney before this was done and after he orally talked to Detective Ferris.

The defendant had been represented by an attorney for approximately one week and had been seen that morning at the arraignment and it can be inferred from this that he had been in consultation with his attorney during the week's period and was intelligently and with knowledge of his constitutional rights informed by his counsel.

The court further finds the defendant was well aware of his rights before, after and during the conversation with Detective Ferris.

The Court further finds the defendant would not talk with other detectives, hence, the conversation with Comodeca subsequent to his

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conversation with Detective Ferris shall be stricken.

He asked to talk to his attorney after conversation with Detective Ferris, but before conversation with Comodeca and the fact is that the defendant had been arraigned and was represented by an attorney which does not prevent the defendant from knowingly and intelligently waiving his rights to be represented by counsel.

He can still confer with the detectives. His only request to do so,

the Court finds, the defendant was present with Detective Ferris to be questioned on other matters than that which he was arraigned on that morning when he asked to talk to Detective Ferris on his own volition.

The Court finds no threats or physical harm used by any detective upon the defendant and that this thing with the detective was his own idea, his request.

The evidence shows from the defendant's own testimony and from his demeanor on the stand that he had nothing to hide and would cooperate with the police at all phases during the investigation. The fact of the matter is that the defendant willingly, intelligently talked to the detective which was

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demonstrated by the defendant himself when he testified in the hearing and stated he talked with Detective Ferris, but when Detective Comodeca came in the room, he refused to say anything when he or other detectives were present, besides Detective Ferris.

This also corroborates the fact the defendant wanted to talk with Detective Ferris and this conversation was to take place without other persons being present other than Detective Ferris. When other persons were present, the defendant himself said, "I will say nothing."

The Motion to Suppress Similar Acts testimony shall be granted and

overruled in part. The testimony of Kimberly Stephens and Mari Nettgen and Lisa Chambers are deemed to be like and similar acts which meet the requirements of that statute.

The Court further finds that Diane Lawson and Mrs. Main are not like and similar acts and shall be stricken and not allowed to testify.

The Court finds the testimony of the witness Yates and Corrigan are not like and similar acts but go to the activities of the defendant on the day the victim allegedly disappeared and their

* * *

EXCERPTS FROM OFFICIAL TRANSCRIPT OF PROCEEDINGS - STATE V. JOHN JOHNSON, CUYAHOGA COMMON PLEAS COURT - TRIAL TESTIMONY OF DETECTIVE FERRIS CONCERNING ORAL STATEMENT OF NOVEMBER 28, 1975 - TRANSCRIPT PAGES 2408 - 2416.

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* * *

A Do you want me to read the report, sir?

Q I want you to read the report to whatever extent you feel necessary to tell this jury everything that is necessary, and if it is necessary to read it, so be it, but if you can recall independently, your own recollection as to what was said --

MR. SPERLI: Your Honor, I object to reading his summary of what the conversation was. He can refresh his recollection.

THE COURT: He may give us his impression of what was said at the time, and he may use that if need be to refresh his recollection. He may read the statement and then verbally give the recollection as to being refreshed as to what was said.

Q Please proceed, Detective Ferris.

A John started out the conversation by saying, "I have been foolish for not saying this before, but I suffer from blackouts."

He went on to say he suffers from blackouts because of his hot temper and he went on to say at one time he apparently woke up from an apparent blackout and his wife asked him if he remembered what he had done and he told her, no,

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and she said, "You tried to put holes in my head."

On the day with the little girl, he said that he was mad about the new manager at the gas station and -- which started it off, and, then, he also said that on the day when he came home, when he was muddy and bloody, he stated that he walked in the house, and when he took his trousers off, he saw his shorts were full of blood, he stated at that time that he thought of the little girl.

Q Now, he was relating his recollection of his thoughts to you on November 20, is that correct?

MR. SPERLI: Objection.

THE COURT: Sustained.

Q Now, he was relating to you his recollection of his thoughts on November 20, is that correct?

MR. SPERLI: Objection, your Honor.

THE COURT: Sustained.

Q Do you know what date he was referring to with respect to those recollections which Mr. Johnson was relating to you?

A He was referring to the little girl on the 20th. He also stated at that time, and I then brought

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to his attention about the little girl, it was not published in the papers until Friday or Saturday which was the 21st or 22nd about the little girl, and, in fact, the little girl was not found until the 22nd.

I believe that was on a Saturday, and at that time he stated it must be in his mind somewhere. He said, "You got me."

Q Go ahead with the remainder of the conversation.

A John Johnson then went on to say that -- and I asked John Johnson, I said, "Well, could that blood be from somewhere else, maybe another man or another woman, a dog, any type of animal?

He stated, "No."

Then I asked him if it could have come from his wife, maybe she was having her period and maybe he had intercourse with her, and he said, "No. Her period isn't even due at this time." Or something to that effect. She is not due for some time or -- I don't know the exact words. It would be in the report.

Q Did you ever ask Mr. Johnson whether he could have killed the little girl?

A I asked Mr. Johnson, I said, "John, could you have killed the little girl?"

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MR. SPERLI: Objection.

THE COURT: Overruled. He may answer.

Q What was his response to that?

A He said, "Yes, I could have killed my own wife that day."

Q Go ahead with what he related to you.

A I then asked John about the fight he supposedly had at West 65th and Clark Avenue that he reported earlier to the police.

John stated, you know, he is stupid, but that was a bullshit thing.

Q Do you know what he meant by that?

MR. SPERLI: Objection.

THE COURT: Sustained.

A He then went on to say there was a fight, he made that story up so his wife would not get involved in anything.

Q All right. Go ahead.

A And that is the story he told his wife. He stated to me that was the

same story that he told his wife, told his wife.

Q Go on with what he also related to you.

A Could I refresh --

Q Yes, you may refresh your recollection by reading

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your report.

A I asked John what he had on the day when he was with the little girl where all the blood was and he stated that he was wearing work shoes, red trousers and a gray sweatshirt along with his shorts that were found by the police.

He also stated his wife had washed his trousers and his sweatshirt and put them up.

He also stated that his gray sweatshirt was in his property at the County Jail and it had been washed, but it was there at County Jail.

He stated his trousers should be at home.

Q Did he state anything to you about the blood on his shorts?

A He stated when he saw the blood on his shorts that he became frightened and didn't know what he had done and thought about the little girl.

Q All right. Now, did you have an occasion -- I am sorry. Go ahead.

A He also stated he threw his shorts in the garbage can and he said he was never -- his wife never saw the shorts. All she saw was his trousers, sweatshirt and clothing.

A What else did he relate to you, if anything,

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Detective Ferris?

A He stated that he could account for most of his time that day, but he said there was a period in his mind that was blank and he could not account for it.

Q Did he give you a time frame for that period?

A Yes, he did.

Q What time frame did he give you?

A He said he had been up the day before on the 20th for 24 hours and he got to bed that morning at 4:00 o'clock in the morning.

He said he awoke at 5:00 o'clock in the morning, went to the gas station where he was employed at 5:30, and at 9:30 he said he was tired and he decided to go home and sleep.

He took some glasses to a bar. He went to Reed's Bar on West 73rd

between Clark and Denison Avenue to pass out -- I think it was a give-away program with glasses given out at the station. He went to give these glasses or pass them out at the bar and he stayed at the bar until about 10:30 or 10:40.

Then he went home. He couldn't sleep. He watched TV.

At 12:45 p.m. he left the house and

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arrived back at the station.

He stated he checked out the station, stayed out there until 2:30, to his recollection, and then he also stated he talked to John Mesko when he was going to the Bounty Bar and told Mesko he was going for a drink for his birthday.

At the Bounty Bar he had drinks and took some type of pill from the barmaid, the barmaid had given him, and he mentioned that there was a Mike from the gas station at the Wheel Cafe and he went there and had another beer.

Then he was asked to move his car because it was blocking a tanker truck. He moved the car and went to the Wheel Cafe.

After drinking more, he went to the station, back to the gas station and then he stated at one time he

visited Lawson's on West 87th and Denison and bought milk.

Then he went home. When he got home, that is when he found he had blood and mud on his clothing.

He stated he couldn't remember how he got the mud and the blood on him, but he knew it was not from a fight as he stated earlier to the police.

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Q Now, Detective Ferris, what Mr. Johnson related to you about the blackouts, did he say anything further about any psychiatric examination?

A Yes. He said that 14 or 15 years ago he went to a psychiatrist, and I assume it was a female psychiatrist, because he said she said there is something there but she just couldn't put her finger on it, didn't know what it was.

He also stated that he didn't want to go to Lima for eight years, come out of Lima and then go to jail for twenty years after he was released from Lima.

Q Did you have an occasion to recover the gray sweatshirt he stated was in the police property room?

A Yes, sir.

(Thereupon article was marked as State of Ohio Exhibit 32.)

Q Detective Ferris, I am handing you what has been marked for the purpose of identification as State of Ohio Exhibit 32. Will you kindly examine that exhibit? Have you seen that exhibit before?

A Yes, sir.

Q Where have you seen it before?

A This is the shirt I got from the property at

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County Jail belonging to John Johnson.

Q All right. Did John Johnson state anything in particular with respect to the shirt?

A He stated that this was the shirt he wore on the 20th which was bloody and muddy. He stated he had blood from the waist up to the chest, also on both sleeves.

Q Did he state whether or not that had been washed?

A He stated it had been washed.

Q All right. Is there anything else, to your knowledge, Mr. Johnson stated to you in your oral interview with him on that date?

A Yes, sir. I asked John Johnson if he were to drive to the park, Metropolitan Park, where the girl was found, how he would drive.

He told me up Lorain Avenue past Fairview Park Hospital, turn left, go past the golf course.

I then asked him why he wouldn't take the freeway or why he wouldn't go the Interstate and he stated because his car heated up.

Q Now, Detective Ferris, at any time during the course of your interview with Mr. Johnson, was he put under any fear through you?

MR. SPERLI: Objection.

* * *

AFFIDAVIT FOR SEARCH WARRANT
OF JOHN JOHNSON APARTMENT
11/22/75

STATE OF OHIO
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS

AFFIDAVIT FOR SEARCH WARRANT

Before me, Norman A. Fuerst, a judge of the Court of Common Pleas, Cuyahoga County, Ohio, personally came the undersigned detective Eugene J. Volk Det, # 2168 who being first duly sworn deposes and says that he is a member of the Police Department of the City of Cleveland, Ohio and that on or about November 20, 1975 in the City of Cleveland, certain personal property hereinafter described, being the property of one JOHN A. JOHNSON or MELLISA HINKE was used as a means or instrumentality in the commission of a criminal offense to-wit the kidnapping and murder of MELLISA HINKE or is evidence of the commission of said offenses. Said property is described as:

> Trace evidence consisting of the personal property of MELISSA HINKE, further physical evidence consisting of blood, semen, Lawson's receipt, clothing, shoes, hair, specimens of foliage, weapons, instruments or tools used in the commission of the crime.

Affiant believes and has good cause to believe that said personal property or some part thereof is now being unlawfully

kept, concealed, and possessed in the City of Cleveland on the premises known as:

> 2006 West Blvd, apartment 1-A, Cleveland Ohio, or fully described as a 3 story red brick building and the same being the resident of JOHN A. JOHNSON.

The facts upon which affiant bases such belief are as follows: Affiant states that on November 20, 1975, the Cleveland Police Department commenced an investigation into the abduction of one MELISSA HINKE upon receiving a report from MRS. JANICE HINKE that her daughter MELISSA HINKE age 8 was missing her absence being unexplained. Affiant further states that during the course of said investigation, it was learned from one MR. BOZAK that JOHN A JOHNSON's 1968 Buick Ohio license number 350184 red body black vinyl top, was seen at or near the area where said MELISSA HINKE was last seen and that MR. BOZAK further observed the driver of the above described vehicle attempt to abduct a young female child the same having occurred at or near the time of MELISSA HINKE's disappearance. Subsequent investigation revealed that JOHN A JOHNSON was the owner of the above described automobile. As a result of the above information, officers of the Cleveland Police Department went to JOHN JOHNSON's address at 2006 West Blvd, at which time JOHN A JOHNSON allowed these officers to check his car. As a result of this cursory search, 2 Pepsi bottles, 1 carton of Lawson's milk in a bag, a towel which was analysed by

the scientific investigation unit and found to have semen present.

Affiant further states, that on November 22, 1975, the partially clothed body of MELLISA HINKE was found in a wooded area of the Cleveland Metropolitan Park-North Olmsted, Ohio with numerous puncture wounds of the upper torso and bleeding from the rectal area. Affiant further states, the body of MELISSA HINKE was conveyed to the county coroner's office by the Park Rangers.

Affiant avers that it is urgently necessary that the above mentioned premises be searched in the night season forthwith to prevent the above named personal property from being concealed or removed so as not to be found.

/s/Eugene J. Volk Det. #2168
AFFIANT

SWORN to before me and subscribed in my presence this 22d day of November, 1975.

CONSTITUTION OF THE UNITED STATES

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE

§2905.01 Kidnapping.

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against his will;

(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances which create a substantial risk of serious physical harm to the victim:

(1) Remove another from the place where he is found;

(2) Restrain another of his liberty;

(3) Hold another in a condition of involuntary servitude.

(C) Whoever violates this section is guilty of kidnapping, a felony of the first degree. If the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

§2907.02 Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of rape, a felony of the first

degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

§2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§2945.59 Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to shown the commission of another crime by the defendant.

78-1573

Supreme Court of the United States

Supreme Court, U. S.
FILED
JUN 13 1979
MICHAEL RODAK, JR., CLERK

October Term, 1978
No. .....

JOHN JOHNSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1978

No. .....

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STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were raised in the trial court, the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of aggravated murder, kidnapping and rape. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed the petitioner's appeal for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. Absent a showing that pre-trial publicity "utterly corrupted" a defendant's opportunity for a fair trial or a showing from scrupulous voir dire examination that any specifically excludable information is set in the minds of the jurors chosen for the trial, the court need not continue the case or grant a change of venue.

2. Where there is no evidence of threat or coercion in obtaining consent to search an automobile, a consensual police search is not unreasonable under the Fourth and Fifth Amendments of the United States Constitution.

3. Where police officers have knowledge of facts and circumstances sufficient to establish probable cause to believe that petitioner has committed a felony, they may arrest without a warrant.

4. Impoundment of arrestee's unsecured automobile and later searches pursuant to the consent of the arrestee including the inventory of its contents is not unreasonable under the Fourth Amendment of the United States Constitution.

5. Where the affidavit for a search warrant contains all the information available from police investigation and sets forth such information including the corroborated reports of a named informant, the determination of a neutral magistrate to issue the warrant is not violative of the Fourth Amendment.

6. Where an affidavit for a search warrant fairly sets forth the grounds for its issuance, and absent a showing of deliberate misleading by the affiant, the determination of a neutral magistrate finding probable cause is not violative of the Fourth Amendment.

7. Where the credible evidence on motions to suppress and at trial show that petitioner was repeatedly warned of his constitutional rights under *Miranda,* and absent a showing of coercion in obtaining exculpatory statements designed to mislead police authorities who are searching for an eight year old girl missing over twenty-four hours, nighttime questioning is not in violation of the Fifth Amendment of the United States Constitution.

8. Where a defendant in custody is warned of his constitutional right to counsel, has the opportunity to speak with his family, travel about the city with police and obtains his car keys from friends, and during that course of time gives police a plausible exculpatory alibi as to the crime concerning which he is being asked questions, and absent a showing of deliberate denial of counsel, there is no violation of the Sixth and Fourteenth Amendments.

9. Where after arraignment on a crime and during the investigatory stages of other crimes, a defendant who is then unrepresented by counsel requests a police officer to talk with him, and after his *Miranda* warnings makes a limited admission, without a request for counsel, there is no violation of the Fifth, Sixth, or Fourteenth Amendments of the United States Constitution.

10. Where a person in custody, properly warned, chooses to participate in oral conversation with a police officer, and makes limited admissions, but later decides not to make a written statement without consulting with a lawyer, there is no violation of the Fifth Amendment with respect to the oral admission.

11. Where a show-up is staged, after arraignment on another crime at which time petitioner is not represented by counsel, and there is no unnecessarily suggestive identification procedure resulting in an in-court identification, there is no violation of the Sixth and Fourteenth Amendments.

STATEMENT OF THE CASE AS TO PRE-TRIAL PUBLICITY

At about 3:30 p.m. on November 20, 1975, Melissa Hinke, age 8, left her mother's home at 2267 West 67th Street to walk to the Lawson's milk store at 6709 Lorain. On the way to that store she was lured into a car by twenty-four year old John Johnson, transported to a remote area of Metropolitan Park, savagely raped, and stabbed and choked to death.

The Missing Persons Unit of the Cleveland Police Department began a city-wide investigation to attempt to find the child, calling in teams from other units to begin a massive search for this missing child. That search and the information police had were transmitted over all available news media in hopes that the lost little girl would be found (E-5). "If you know anything at all about Melissa Hinke's whereabouts, you are asked to call the Cleveland Police."

She was found, two days later, on November 22, 1975, at 10:00 a.m., by Mark Cervan, age 16. Local news media gave reports of the brutality of the crime, police investigation, and grief of Melissa's family. The defense exhibits, stipulated by the State, were the only media coverage that mentioned the Hinke family, Johnson, or anything close to the events of the crime. (Defendant's Exhibits A, B, C, all the venue motion exhibits from newspapers in record.) See chart on the following page.

DAY AND DATE	SUBJECT	A PLAIN DEALER EXHIBITS	B PRESS EXHIBITS	C SUN EXHIBITS	D WKYC (8)	E NEWS (5)	F WJW (3)
Friday 11/21/75	Search	1	1,2			13,14	1,2
Saturday 11/22/75			3,4		,10,11	16	
Sunday 11/23/75	Body found	2			7,8		
Monday 11/24/75	Suspect held	3	5,6,7		5,6	17,18	3,4,5,6,7
Tuesday 11/25/75	Indicted	4,5,6	8,16			1,2	8
Wednesday 11/26/75	Burial	6,7	9		1,2,3,4	22,23,24,25 26,27,28,29,	9,10,11,12,
Thanksgiving Thursday 11/27/75		14,9,11,12	10	1 (Dirty book store)		19,20,21	13,14 16,17
Friday 11/28/75	Arraignment	10			13,14,15,16 17,20,21	3,4,5,6,7,8	
Saturday 11/29/75		12					
		12/7/75 Letter to editor -- Anti Smut	12/5/75 Open Hearts help Mrs. Hinke	12/4/75 Dirty book store	12/18/75 Only 30 people attend auction		

The news media, in this case, was guarded in its treatment of the suspect John Johnson, not using his name until November 25, 1975 (Defendant's Exhibits A-4, B-5), and saying he was not a good suspect, as he was home at 5:00 p.m. (A-3). (B-8) ". . . We do not presume to judge this man's guilt or innocence." Even Johnson's appearance in the media showed signs of tempered restraint. He told reporters on November 28, 1975 (E-4, 5) "Get a good shot but don't run out of film." The last article in the case, December 24, 1975, was an interview with Johnson's friends, calling him a good guy and adding credibility to the rumors that the real kidnapper was still lurking about the area (B-15, B-13).

The news coverage in the event ran within November 21, 1975 to November 29, 1975, followed by small notes holding petitioner in a good light, showing citizens' action, or donations from the Fraternal Order of Police (A-10). The sum total of the public's excitement is demonstrated in Defense Exhibit D-12, December 18, 1975, by the fact that "only 30 people attended the charity auction" held to benefit the victim's family.

On November 28, 1975, in arraignment, John Johnson was to be appointed lawyers. Those lawyers filed motions for discovery on December 5, 1975 and then sat back and waited to see if ninety (speedy trial statute) days would pass. The Court, under a requirement to call a special venire, set the petitioner's trial for February 23, 1976. One hundred jurors were requested of the Clerk on January 27, 1976.

On that day, defense counsel, aware of the trial date, filed a motion to suppress and a motion to voir dire identification witnesses. On February 18th, the Wednesday before trial, petitioner changed his plea to not guilty by reason of insanity, and moved for a continuance to obtain

expert services of a forensic pathologist to examine evidence. As a result of the change of plea, the State moved for a neurological examination of petitioner. The Court, having summoned the venire, overruled the motion for continuance, but made all the State's physical evidence and experts available to defense counsel.

STATEMENT OF THE CASE

On November 20, 1975, at 2:35 p.m., Kimberly Ann Stevens, age 8, walked up to cross an alley at 52nd and Eichorn, and "a car pulled up in front of me and said come here little girl" (R. 645, 1712). The car was a red (R. 651) Buick with a black top (R. 1718, 1719). The driver had a moustache, and black or brown hair (R. 1714) (B-1).

Charles Bozak, bringing empty cases across the street, figured out what he was doing . . . "Well, I seen his arm over the seat motioning to the girl" (R. 1745) . . . "I run in and told my wife. I gave her a license number" (R. 1745) . . . "350184, Ohio" (R. 1749) . . . "Red Buick, clean, like it just came out of a used car lot" (R. 1751) (B-1).

At about 3:00 p.m. only 25 minutes later, Mari Nettgen, age 11, went to Vicki's Candy Store at 51st and Clark after school, ". . . and I came down the alley and a car pulled over and asked me if I knew where 'T.J.' (Thomas Jefferson Junior High) was." (R. 1776). He said, "I will give you a dollar if you show me where 'T.J.' is." (R. 1779). "Red car" (R. 822) . . . "two door, blue tinted glasses, moustache" (R. 814-816, 1781-1784).

At 3:30 p.m., eight year old Melissa Hinke left her home on West 67th Street to walk to the Lawson's Store at the north end of her street. She had three quarters,

some pennies and two quart Pepsi bottles to purchase milk (R. 1830-1836). At the same time, John Mesko saw John Johnson, his friend, at West 67th and Hague, the street immediately south of the Lawson's Store drinking a beer in his 225 Buick, red with a black top (R. 1839).

At 11:00 p.m. on November 20th, Lt. William Thomas Hanton, the First District watch commander, ordered two men to look for a vehicle wanted in the Second District in connection with the attempted abduction of Kimberly Stevens, and possibly involved in the missing person investigation regarding Melissa Hinke (R. 963, 1893). At 12:15, Lt. Hanton responded to West Blvd., looked through the window of the vehicle and saw two Pepsi bottles on the floor of the vehicle, and a bag with a carton of milk. Lt. Hanton and his men went to apartment 1A, knocked and Johnson came to the door (R. 970,1898).

> "We told him we were investigating a complaint and would like to talk to him. He invited us in and went in the bedroom and changed into some clothing."
>
> "We stayed in the front. His wife came out then he came back out." (R. 970).
>
> "I told him we had a complaint and I would like to look at his car, if he would give us permission, and he did." (R. 971, 1899).

Johnson walked out with the police officers and opened the trunk, police looked in, then he opened the car and the police looked in (R. 990). Hanton's information was that Melissa never got to Lawson's (R. 1708), so he left the milk but he took the Pepsi bottles and a towel as the size of the reported bottles could have been an error. In any case, he let Johnson go back to bed and sent the bottles and a towel to S.I.U. (R. 1000), "they were asked of Mr. Johnson, if we could take them." (R. 1902).

At 8:45 a.m., November 21, 1975, General Duty's Marish, Mulhall, and Murphy reported to the mobile command base at 67th and Lorain under the command of Lt. McNamara. They went up and down the streets conducting interviews (R. 1912); they then were assigned to check out the information that had been reported to the Second District concerning the attempted abduction of Kimberly Stevens (R. 1913). They checked Bozak's information and returned to General Duty at about 7:00 p.m. (R. 1914). Melissa Hinke was still missing and police authorities, having followed up over one hundred investigative leads (R. 1241, 2951), corroborated Bozak's information (B-1&2), and found that the towel had semen stains, determined that Johnson should be questioned. At 7:15 p.m. Mulhall and Murphy went out to Mr. Johnson's place of employment (R. 1243, 1358):

> "Do you know why we are here?"
>
> "You are here about the missing girl."

He was placed under arrest, advised of his rights and allowed to call his wife; they waited twenty minutes for a replacement to come out to the station to take over. They left the station about 7:30, had the car towed from the Shell station down the road where Johnson had left it with the key in the ignition (R. 1244, 1246).

On the way down they talked and when they arrived downtown, Johnson was taken to the third floor, Scientific Investigation Unit (R. 1246). Johnson was left with the officer in the polygraph section until 10:30 p.m. At 10:30-10:45, Johnson was returned to the General Duty detectives; he had not passed the lie detector, and was advised of his rights and he was booked at 11:30 p.m. This is the first time Johnson was "questioned" about Melissa Hinke (R. 928, 1916).

"We spoke to Mr. Johnson on the possibility of someone using his car, possibly it was a mistake in license number, explanation as to why his license number would have been obtained at the scene on Eichorn." (R. 928, 1916-1917).

Johnson's wife showed up at the police headquarters, earlier, and spoke from time to time with Officers Mulhall and Murphy while her husband was up at S.I.U. for the polygraph test; in fact, she herself was fingerprinted for elimination purposes (R. 1273). Mulhall told her as far as he was concerned she should notify a lawyer (R. 1274). Mrs. Johnson talked with Johnson, too, and took his wallet home; she testified around 10:00 p.m. a policeman told her she did not need a lawyer, but no police officer ever told her he would be released if he made a statement (R. 2512).

Johnson gave the police permission to search his car, but they would have to get the trunk key (R. 1247). At 1:15 a.m., Marish, Mulhall and Johnson went to a location in Lakewood; Johnson retrieved his keys and handed them to Mulhall (R. 1275). They all went to the Impound Unit, looked in the car, found nothing, went back to General Duty (R. 1919, 1278).

Johnson was taken to jail, and Marish and Mulhall went home (R. 1921) at 2:30 a.m. They intended to take a written statement and release Johnson in the morning.

Meanwhile, the Homicide Unit learned Johnson had been arrested and at 1:30 a.m. Detectives Koelliker and Leppelmeier were detailed to see Johnson (R. 1129); when they got to the jail, Johnson was not yet there, as he was being processed and fingerprinted at S.I.U.; Koelliker waited until 2:00 a.m. (R. 2161, 2172), saw Johnson, advised him of his rights, accused him of killing Melissa Hinke

(R. 1134), and received an oral explanation from Johnson which exculpated him (R. 2160). Defense counsel were given the police officer's reports for cross-examination purposes (R. 2[illegible]3). Police officers made their written reports of this story, put Johnson back in jail about 4:30 a.m., and the detectives went home (R. 2159). Defense counsel, in their questions, accused Koelliker of telling Johnson's wife he would be released if he made a statement. She denied this empty accusation as did Koelliker (R. 1137, 2512).

At 8:30 a.m., Marish, Murphy and Mulhall took Johnson from the jail, and filled out a "release" slip to release Johnson from custody (R. 953, 1353). Johnson made a written "witness statement" (Appendix B-3) at that time, indicating his whereabouts on November 20, 1975 and his assent to searches of his vehicle.

At 9:30 a.m., while the statement was being made, and unbeknown to Marish, Mulhall and Murphy, the General Duty Captain called in Homicide to take over this case (R. 2313). Homicide Sergeant Comodeca went to Central Police Station and found Johnson was being released from custody; thus, he took charge of the investigation, at 10:00 a.m., November 22, 1975 (R. 1308, 2314), had Johnson rearrested, photographed (B-4), searched his body for marks, and confiscated his clothing, none of which had been done by the General Duty Detectives.

At 11:30 a.m., while Homicide Officers were talking with Johnson, they were informed that Melissa Hinke's body had been found (R. 2314-2315).

On the same morning, at 9:30, Pat Reynolds and officers of S.I.U. inventoried the car, photographed it, and processed it for fingerprints at the impound garage, as a part of their normal processing of impounded cars (R.

1310). They too were called to the scene of Melissa Hinke's body (R. 2225) at 11:00 a.m.

Police officers went to the scene, and returned to Central Police Station (R. 2243) where they met petitioner and waited for his attorney, Mike Tholl, who told them, "No statement today" (R. 1108). On the 22nd, Detective McDonald talked with Johnny Mesko, who had seen Johnson behind Lawson's at 3:30 on November 20, 1975, and then Homicide Detective McDonald went to Metropolitan Park.

On November 22, 1975, the Homicide Unit took complete charge of the investigation. Detective Cudo interviewed Kimberly Stevens, Michael Webb, Darlene Webb, Robert David, and Mrs. Stevens. Kimberly identified Johnson's photo as looking like the man who attempted to pick her up.

Homicide Detective Eugene Volk (R. 1140), working second platoon, presented an affidavit for a search warrant (Exhibit A), and executed a search of the premises of Johnson's home pursuant to the warrant (B-5), in company with S.I.U. officers, including Pat Reynolds who had been to the crime scene (R. 2225, 2243). A photographic record was made of the materials seen at Johnson's home (See State's Exhibits). Bloody shorts, beer cans, Kool cigarettes, Lawson's milk, bloody rags were found there (R. 2249-2255).

On November 23, 1975, Sunday, Homicide followed up, talking with Herbert Corrigan, Harvey McGuire, Anna Yates (R. 2812) and Mary Jones (R. 2088). A written defendant's refusal statement (R. 1357), embodying the "*Miranda* Rights" was taken (B-6). Literally hundreds of investigative leads were followed up (R. 2951). In the next couple of days, arrangements were made for

various victims of other sex crimes to come to Central Police Station on November 28, 1975 (R. 2396, 2317). Diane Lawson picked Johnson's picture and a Rambler automobile (R. 785) which matched the plates 350184, Mulhall had run on the computer (R. 1271) (B-2). Debra Main identified Johnson as accosting her (by photo) (R. 701), Lisa Chambers gave a description, and picked Johnson's picture (R. 858, 832, 1058).

On November 24, 1975, Detective Dan McDonald got a search warrant on the auto which was still being held, and Detective Reynolds executed the warrant, finding three burrs, "tick trefoil, meilbomia nudflora" (R. 2263, 2301).

On November 28, 1975, police officers had various witnesses, including other sex crime victims and Lisa Chambers come to Central Police Station, to view Johnson, and Homicide Officers attended the arraignment where his attorney withdrew and new attorneys were to be appointed (R. 2324).

Sergeant Peter Comodeca and Detective Terpay took Johnson to Central Police Station from County Jail and brought him into a room with a one-way mirror. While they were in the room, various persons were asked to look into the room. Johnson was identified by Lisa Chambers, she said he looked like the man who had accosted her.

Detective Don Ferris was one of the people dispatched to pick up victims that day, and was responsible for bringing Lisa Chambers from Brookpark. When he got to the room, about 11:00 a.m. Johnson said he wanted to talk to him privately (R. 2404). Ferris told him, "John, you know you don't have to talk to me because anything you tell me could be used against you if it ever goes to court." (R. 2405, 1361). Ferris gave him his rights and Johnson

told Ferris a new story. After the oral discussion, Ferris asked if he'd make a written statement and Johnson said not without his attorneys. Ferris asked him to repeat the story in front of Sergeant Comodeca, and Johnson did (R. 1086, 2427, 2407, 1065).

The petitioner was permitted to sit and hear all the motion testimony and he took copious notes as to the testimony of each witness put forward in the motion hearings (R. 1384); he did not have to answer each motion separately. Petitioner's direct examination on the motions was so well prepared that it was not credible. He alleged he had lost sleep, that police (R. 1335) had forced their way into his house and searched his car without his resistence (R. 1338), but without his consent. He said no one told him his rights, or at least he could not remember (R. 1340) anyone giving him his rights; that the police said, they "had to have ignition key" (R. 1345), and he went with them, but alleged it was against his will; that he didn't get any sleep before the detectives questioned him, and that they had questioned him at 4:00 or 6:00 in the morning (R. 1349); that he asked for an attorney (R. 1350); that he was told by Detective Murphy that he would be released if he made a statement (R. 1351); that he was harassed and threatened (R. 1359); and that he voluntarily talked with Ferris, but it was supposed to be off the record.

On cross-examination, the State showed him to be lying, that detectives never needed the ignition keys (R. 1379) as he had quoted them, that he gave permission to the police to search his car (R. 1387). He maintained nobody gave him his rights, until the State began laying the foundation to bring in the tape recordings of the polygraph examination, then he suddenly remembered that his rights had been read to him (R. 1408).

The Court found that petitioner had consented to the search of the auto, that the warrants supporting the November 22nd house search and the seizure and inventory of the vehicle, and seizure of the keys were not unreasonable searches. And, that the seizure of petitioner's clothing in custody was not illegal.

The Court further held that the oral and written admissions of petitioner explaining his whereabouts on November 20, 1975, given to police on November 22, 1975 were made with a knowing and intelligent waiver of petitioner's constitutional rights against self-incrimination. The Court allowed the use of Johnson's oral statement to Ferris, but ruled that the statements made after Johnson told Ferris that he wanted his attorneys present for a written statement should be suppressed.

The Court further held that the testimony of Debra Main and Diane Lawson should not be allowed as similar acts.

REASONS FOR DENYING THE WRIT

1. Absent a showing that pre-trial publicity "utterly corrupted" a defendant's opportunity for a fair trial or a showing from scrupulous voir dire examination that any specifically excludable information is set in the minds of the jurors chosen for the trial, the court need not continue the case or grant a change of venue.

On February 23, 1976, fifty prospective jurors entered the courtroom of Judge Francis Sweeney in response to a summons to serve as jurors in Case No. CR 23071, *State*

of Ohio v. John Johnson. The Court, in order to avoid contaminating the panel with pretrial publicity, had the motions scheduled after jury selection. (See record of events).

The jury selection was carried out within two days. The Court inquired of each juror concerning pretrial publicity. The power of the trial court to grant a change of venue is statutory, *State v. McGehan* (1875), 27 Ohio St. 280. Under Section 2931.29, Ohio Revised Code, ". . . if it appears to the Court of Common Pleas, by affidavit or evidence in open court, that a fair and impartial trial cannot be had in the county where a cause is pending such court shall order the accused tried in another county." The action by the trial judge in a motion for change of venue is final in the absence of an abuse of discretion. *Richards v. State* (1932), 43 Ohio App. 212; *State v. Laskey* (1968), 13 Ohio App. 2d 91.

The examination of the jurors in voir dire affords the best test as to whether prejudice exists within the community against petitioner, and where it appears that opinions as to the guilt of petitioner by those called for examination as prospective jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, *State v. Swiger* (1966), 5 Ohio St. 2d 151. As stated in *State v. Laskey, supra*:

> "It does not necessarily follow that a venireman who has read accounts of a crime in a newspaper disqualifies himself, if he can truthfully say that he will decide the case solely on the evidence and the law given to him in court." Also see *Beck v. Washington* (1961), 369 U.S. 541.

In the case at bar, Judge Sweeney's (the Court's) inquiry begins at page 39 of the record:

"THE COURT: All right, fine. Now, that was on the question of jury service. We will get to another part of this case.

Obviously there has been publicity about this case in the news media. Now, I will ask you questions as to the publicity that you may or might not have had access to in this case.

Now, you are not disqualified just because to read something about it, but we must determine whether or not, you have heard about this case, whether or not you can dismiss what you may have heard or read about the case and determine this case only on the—determine the innocence or guilt of the defendant only on what you hear in this courtroom.

Now, I will be questioning all of you on that subject of publicity of the case prior to coming in here this morning. As I said, the case involves an alleged abduction, rape and murder of the girl, eight years of age, her name being Melissa Hinke. She lived at 2245 West 67th Street, and the alleged date of the homicide was November 20, 1975.

Mr. Knetzko, have you heard or had any exposure to this case before coming in this morning?

JEFFREY KNETZKO: Yes, your Honor. I read about it in the papers.

THE COURT: All right. Do you recall specifically what you read, or is that you read something, you have some general knowledge about it and no specifics, what is it?

JEFFREY KNETZKO: General knowledge.

THE COURT: General knowledge of it. Did you express or form any opinions on the subject of that article or articles at the time you read them?

JEFFREY KNETZKO: I believe I had.

THE COURT: You have done that?

JEFFREY KNETZKO: Yes.

THE COURT: All right. Do you feel that what you have read or what you determined from any of the news media that you read or heard would be such that you could not exclude that information from your memory and judge this case solely on what you hear in the courtroom?

JEFFREY KNETZKO: I believe so."

Mr. Knetzko was dismissed for cause.

The Court's voir dire was carried out in front of the whole jury with the Court systematically covering the traditional question of publicity (R. 68), police (R. 70), victim's age and sex (R. 75), violent crimes (R. 76), detectives and prosecutors (R. 78), problems at home and time (R. 79). All these issues were put forward for jurors to excuse themselves if they felt they could not be fair. A good example on how easily the Court released for cause is on pages 396, 387, 384, 414, 411, 406, 327, 326, 42, 50, 52 and 60 of the record.

The seventeen jurors that were dismissed for cause were asked to consider publicity, the nature of the crime or any other reason they could not sit. Their responses are cataloged below, and differ considerably from the characterization in petitioner's Petition as to the issue of pretrial exposure to media and their reasons for wanting off the panel.

Juror	Type of Knowledge or Exposure & Publicity	Reason for Dismissal (paraphrased)
Knetzko	General knowledge (R. 40)	Don't think I could be fair (R. 42)
Hersh	Had read about it (R. 50)	No, I don't think I could (R. 50)
Strickland	Yes, heard about case (R. 51)	No, cannot put aside (R. 52)
Ms. Bungard	General knowledge (R. 56)	I believe I could not sit (R. 56); Called for prior murder trial—prior service would cause problems (R. 57)
Ms. Fletcher	Heard about case	Don't think I could (R. 60)
Ms. Rogers	Heard about this case (R. 47)	Could decide on evidence but have economic hardship, commission salesman
Ms. McGoye	Not very much, but some	Don't think could set aside (R. 326)
Ms. DiLeone	Could not dispell	Could not be fair (R. 327)
Ms. Alderman	Read or heard one item	Would identify with little girl (R. 329)
Ms. Kress		Could not sit
Ms. Rudolph		Could not sit (R. 411)
Berman	No exposure	Do not feel objective, have five year old (R. 414)
Ms. Furman	Vaguely	Testified in molesting case (R. 384)
Ms. Germuska	No media - heard about	Expressed prior opinion (R. 387)
Ms. Bland	Had information	No opinion, had nieces and could not view evidence (R. 396)
Knipper	T.V. and newspapers (R. 527)	No bearing on decision, but had attempted abduction on daughter (R. 531)

Of those dismissed peremptorily the parties clearly indicated that they would put aside any opinions of what the evidence may be and decide the issues under the instructions of the Court based upon in-court evidence.

Juror	
Matuszak	Yes, heard about in media, would follow instruction (R. 62, 284) Fourth year law student State Preempt #1
Dargaj	Could be fair, saw coverage around the time (R. 275, 300) No opinion now Defense Preempt #1
Bailey	Read some, little bit, saw T.V. (R. 63), can judge solely on evidence State Preempt #2
Goodwin	Heard about it, could base upon facts (R. 45, 302) Defense Preempt #2
Walsh	Did not hear very much about it, was in hospital (R. 59, 176) No specific recollection State preempt #3
Greene	Heard about and read about, but would not affect (R. 84) ability to be fair Defense Preempt #3
Joseph	Very vague, no specifics (R. 478), base opinion only on evidence State Preempt #4
Kruger	Very little, just headlines, could set aside (R. 341) Defense Preempt #4
Cummings	Read about, could determine solely on courtroom evidence (R. 67) Defense Preempt #5
Keane	No exposure (R. 304-307) Defense Preempt #6
(Alternate Preemptor)	
Stoll	Read papers, remembered little (R. 571), solely on testimony, Mr. Sperli's client, State Preempt

The speech of Mr. Berkman at (R. 268-274) confused and intimidated potential jurors as the record shows, his specific use of leading questions on Juror Dargaj (R. 274), and Juror Goodwin (R. 278) fashioning his question to look like the words of *Irvin v. Dowd*, 366 U.S. 717 at 728:

> ". . . where eight of twelve jurors had formed an opinion that the defendant was guilty before the trial began, some went 'so far as to say it would take evidence to overcome their belief' in his guilt."

Judge Sweeney, having the opportunity to observe these tactics and the demeanor of the jurors could see that #1 and #2 were no mental match for Mr. Berkman, but juror #3 was (R. 279-281). The court corrected the incorrect

material which Mr. Berkman had attempted to cajole out of the prospective panel. (R. 291-300)

It should be noted that by instruction (R. 68, 142, 245, 342) and sequestration (R. 623), the panel was insulated from any further opinions about the case from news media from 8:00 a.m. on February 23, 1975. Thus they never saw the documentary (R. 1544) referred to in Exhibit (MB 1 & 2), page 22 of petitioner's brief. Each juror was asked if he violated the court's instruction (R. 361-419). The record simply does not bear out the inferences made by petitioner as to the jury being subject to such publicity.

The final jury contained the following fourteen jurors (includes alternates), all of whom were acceptable to petitioner.

*#1 William Nest	Heard very little, formed no opinion, would base solely on courtroom. (R. 330) Defense passed for cause (R. 341)
#2 Robert Anderson	Had some information from the "Press", basically headlines, could determine on the evidence alone (R. 434) No challenge for cause (R. 453)
#3 Emily Morey	Saw in news media (R. 46), would base decision in the courtroom, did not form definite impressions (R. 381) No challenge for cause
#4 Diane Strasshofer	Saw some on television (R. 494), no specifics didn't pay much attention, could serve impartially. Pass for cause (R. 507)
#5 Joseph Brooks	Some pretrial publicity, could set aside and hear the evidence (R. 55). Very, very little, noticed Friday somebody to be tried (R. 286) No challenge for cause.
#6 James O'Connor	Read in newspapers, vaguely remember, no specifics (R. 458), solely on facts. Pass for cause (R. 477)
#7 Leonard Honacki	Very little (R. 528) Television, when it happened, could determine from courtroom. Pass for cause (R. 569)

#8 English Anderson	No, when it first happened, but forgot it, remember nothing specific, "Not a thing" (R. 508) No cross on publication. Pass for cause. (R. 522)
#9 Patrick Nevin	Newspaper and T.V., could judge solely on evidence. (R-64) No cross on publicity. No challenge for cause.
#10 Helen Amos	Just in the media, could set aside and determine on evidence (R. 64) No cross on publicity. No challenge for cause.
#11 Charles Rucker	Heard about generally but could be fair. (R. 65) Didn't keep up, don't read papers (R. 284). No challenge for cause.
#12 Joyce Tanski	Mostly T.V., no specifics, could determine solely on evidence in court (R. 552) Pass for cause (R. 547)
*Juror #1 was replaced	prior to opening statements. (R. 1125)
#13 Albert Compton	T.V., no newspapers, nothing specific (R. 589) Would have no effect (R. 602) "We are satisfied with this juror." (R. 605)
#14 Donald Koshla	Heard about when first happened, would determine solely on evidence in court (R. 605) Pass for cause (R. 622)

And finally, the defense stated "Your Honor, we are well satisfied with the jury." (R. 622).

The Supreme Court decisions on the issue of pretrial publicity are clearly supportive of Judge Sweeney's action in this case, and are reviewed most recently in *Murphy v. Florida*, 421 U.S. 749 (1975). At page 800, the Court noted:

> "We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory. e.g., *Beck v. Washington*, 369 U.S. 541, 556 (1962). To ignore these real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent. . .
>
> In the entire voir dire transcript furnished to us, there is only one colloquy on which petitioner can base even a colorable claim of partiality by a juror. In response to a leading and hypothetical question, presupposing a two or three week presentation of evidence against petitioner and his failure to put on any defense, one juror conceded that his prior impression of petitioner would dispose him to convict . . . We cannot attach great significance to this statement, however, in light of the leading nature of counsel's questions and the juror's other testimony indicating that he had no deep impression of petitioner at all." 421 U.S. at 800.

" 'The critical standard which must be met is whether the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' *Irvin v. Dowd* (1961), 366 U.S. 717, 6 L. Ed. 2d at 756." (See, Journal Entry, p. 4.)

We submit that this critical standard was met in Johnson's case and a fair trial, composed of fair jurors, decided the case based on evidence adduced within the four corners of the courtroom and nowhere else.

The cases relied on by petitioner have no application to this case. Each of them is easily distinguishable in that the trial atmosphere had been utterly corrupted by press coverage. No such situation was present in this case.

As alleged in petitioner's argument, there were two reporters allowed to occupy seats at a table physically located "inside the rail"; no objection was *ever* raised, nor was that issue ever complained of on appeal; only at the very close of the State's case did counsel point it out *for the record* (R. 2467-2470).

In *Irvin v. Dowd, supra,* the defendant, in a rural community, had wide continuous publicity including his confessions to twenty-four burglaries and six murders, and his publicized offer to plead guilty to avoid the possibility of the death sentence. Even in *Irvin,* the Court held:

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."* Id. at 723, 6 L. Ed. 2d 751, 81 S. Ct. 1639. (Emphasis added).

In *Rideau v. Louisiana,* 373 U.S. 723 (1963), the defendant's twenty minute filmed confession was broadcast on the local T.V. stations.

In *Estes v. Texas,* 381 U.S. 532 (1965), the trial was a "circus atmosphere" due to the intrusion of the press, including T.V. equipment in Court.

The procedure chosen by the trial court assured a fair trial based upon the composition of the jury and voir dire examination as to pretrial publicity and counsel's charge against the trial court on page 24 of his petition is a distortion of the record.

Most recently this Court has passed on the issue of publicity in *Dobbert v. Florida,* 432 U.S. 282 (1977), which reaffirmed the *Murphy* standard in a case factually near the case at bar:

> " 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' Id., at 799-800, 44 L. Ed. 2d 589, 95 S. Ct. 2031, quoting from *Irvin v. Dowd,* 366 U.S. 717, 723, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961).
>
> We concluded that the petitioner in Murphy had failed to show that the trial setting was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice. 421 U.S., at 803, 44 L. Ed. 2d 589, 95 S. Ct. 2031." *Dobbert* at 302.

Counsel argues that petitioner's opportunity to have a fair trial in the Common Pleas Court was poisoned by the media, but the record shows that, there were only five days of coverage, from the 25th of November until November 29th, which dealt with Johnson, as the suspect; there were no personal invidious attacks of the type found in *Shepard v. Maxwell,* 384 U.S. 333 (1966), *Riddeau* and *Irvin,* nor was there the circus atmosphere complained of in *Estes.*

The scope and manner of the voir dire is entrusted to the sound discretion of the trial court, *Hambling v. U. S.,* 418 U.S. 87 (1974), *Ristano v. Ross,* 424 U.S. 589, 594, 47 L. Ed. 2d 258 (1976) (see *Voir Dire - Pre-trial Publicity,* 28 A.L.R. Fed. 26), the Court allowed the petitioner to pry into the minds of each juror who sat on the case, and neither the tenor or volume of publicity, or the specific information which reached the jurors who were selected was such as to "utterly corrupt" his opportunity for a fair trial.

A postscript which accurately reports the notoriety of the case appeared in the December 18, 1975 television report—only thirty people attended the charity auction for the Hinke family.

2. Where there is no evidence of threat or coercion in obtaining consent to search an automobile, a consensual police search is not unreasonable under the Fourth and Fifth Amendments of the United States Constitution.

The whole reason for the "exclusionary rule" is to deny the State the use of evidence obtained through conduct of police authority which infringed on the petitioner's constitutional rights, *Wong Sun v. U. S.*, 371 U.S. 471 (1963); *Michigan v. Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182 (1974) at 441. Petitioner argues that the fact that petitioner had been without sleep colored his judgment such that he ought not have consented to allowing police to search his car. In *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 117 (1968), the petitioner's grandmother gave consent, and thus the rule that the burden is on the prosecutor to prove a waiver. In *Lakewood v. Smith*, 1 Ohio St. 2d 128 (1965), police went to a "Bookie's" apartment and dared him to empty his pockets. He emptied one, but would not empty the other, and the police officer reached in and found betting slips. In the case at bar, police who saw a towel and bottles sitting in open view in the car may well have arrested Johnson and taken him downtown but for the fact of his cooperation. The trial court in the case at bar had to deal with credibility, and found the petitioner's well-schooled testimony, and the later programmed responses of Mrs. Johnson in her testimony, incredible. It is interesting to note the responses of Mrs. Johnson in her testimony in the case-in-chief, such as "sometimes he wouldn't have a scratch on him at all, nothing, . . ." (R. 2481); "make sure there was milk in the house. . ." (R. 2483); her explanation of Johnson's dark glasses (R. 2484) et seq. is particularly indicative of the programmed responses "they were in open view. . ." (R. 2497); ". . . he always made sure there was milk." (R. 2499). Both her testimony

and his totally lacked in credibility. The Court, hearing credible evidence before it, found that Johnson granted police permission to look into his trunk and into his car (R. 1533). Petitioner's statement, he was told that they all "had to go outside to his car", (P. 27 petition) distorts the context of the record (R. 990-992; 971-1335). At (R. 1377): "They asked me if that was my car out front, and I said yes, and they said they wanted me to go out and look at it. I said Okay." A search properly conducted pursuant to a valid consent is constitutionally permissible. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The Cuyahoga County Appeals Court dealt specifically with the auto search finding no unreasonable search:

> "The first charge in the sequence of events questioned by the appellant objects to the search of the appellant's automobile in the early morning hours of November 21, 1975 without a warrant. We reject this assignment of error because the appellant consented to the search, led the officers to his car without objection, and opened the car doors which he declared to have no operating locks.
>
> The assertion by the appellant that he was responding to an unwarranted show of police force in performing these acts would lead to a legally untenable conclusion. This has been set forth logically and cogently in *People v. Michael* (1955), 45 Cal. 2d 751. There the court said:
>
> 'It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers would permit the criminal to defeat his prosecution by voluntarily revealing all of

the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority.' *Id.* at 754.

In the circumstances present here, we are unable to discern any evidence of coercion or threat by the interrogating officers at the time of the requested automobile search. Nor was there any evidence of implied threat, coercion or compulsion at any further stage of the proceedings. The conflicting evidence with respect to advice of counsel as well as other *Miranda* rights, *Miranda v. Arizona* (1966), 384 U.S. 436, permitted the trial court considering the motions to determine as a matter of credibility that the appellant had been properly appraised of his constitutional rights by several officers at several times. In fact, when he was initially taken into custody in the early morning hours of November 22, 1975, the appellant himself indicated that he had been so advised. The court, at the conclusion of the appellant's testimony with respect to the lengthy series of motions, addressed him directly as follows:

> 'Mr. Johnson, on the statement you gave on the 22nd of November, was this question asked of you and did you give this answer, "When you were arrested, were you advised of your constitutional rights, and did you understand them?" '
>
> ' "Answer: Yes." '

To this question by the court, the appellant responded:

> 'I don't know whether I gave that answer or not, but if it is there, and I signed it.' (Tr. 1417.)

In addition to this testimony, the appellant was questioned on his statement with respect to the search of his car and home as follows:

> ' "Did you give permission to the detectives of the Cleveland Police Department to search your car and home for any part of the clothing belonging to Melissa Hinke?" '
>
> * * *
>
> 'Yes, I did give permission.' (Tr. 1387.)

These statements, although the appellant sought to question their specificity, remain in the record as strong indications of the effort by the investigating officers to comply with the requirements of *Miranda*.

The important aspect of the evidence as it emerged here is anticipated in *Schneckloth, supra,* at 229:

> 'The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a "voluntary" consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of "voluntariness." '

The appellant's challenge to the warrantless search of his automobile and the seizure of various items found in the course of the search is therefore overruled."

The police in this case while searching for the missing Melissa Hinke did not arrest Johnson even though his car was identified as the vehicle involved in the attempted abduction at West 52nd & Eichorn. The totality of the facts do not support any showing of force or coercion, thus there is no question before the court of an unreasonable search. Even if this Court would give credibility to the petitioner's acquiescence argument, the Court's analysis in *U. S. v. Watson*, 46 L. Ed. 598, 423 U.S. 411 (1976), 425-426 is dispositive of the issue presented:

> "There was no overt act or threat of force against Watson proved or claimed. There were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment. He had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station. Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, under *Schneckloth*, the absence of proof that Watson knew he would withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance. There is no indication in this record that Watson was a newcomer to the law, mentally deficient, or unable in the face of a custodial arrest to exercise a free choice. He was given *Miranda* warnings and was further cautioned that the results of the search of his car could be used against him. He persisted in his consent.

> In these circumstances, to hold that illegal coercion is made out from the fact of arrest and the failure to inform the arrestee that he could withhold consent would not be consistent with *Schneckloth* and would distort the voluntariness standard that we reaffirmed in that case."

3. Where police officers have probable cause to believe that petitioner has committed a felony they may arrest without a warrant.

> "The usual rule is that a police officer may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony. . ." *U. S. v. Watson*, 423 U.S. 411, 417; *Carroll v. U. S.*, 267 U.S. 132; *Henry v. U. S.*, 361 U.S. 98 (1959).

Petitioner says that some evidence was obtained as a result of an illegal arrest. Specifically he complains that police did not have probable cause that a crime was being or had been committed by petitioner.

The Court heard testimony that one hour before Melissa Hinke was taken, petitioner, or someone who looked like him, in his car, attempted the abduction of another little girl within one-half mile of the site of Melissa's disappearance (R. 623); that in his car were two Pepsi bottles and a semen stained towel (R. 979-1000). Melissa Hinke was missing at least forty-eight hours by the time Johnson was arrested. (*State v. Fultz*, 13 Ohio St. 2d 79 (1968).)

The trial and appellate courts felt that police had probable cause to arrest Johnson. But, petitioner argues that the car, keys, and statements ought to be suppressed, comparing this case to *Brown v. Illinois*, 45 L. Ed. 2d 416 (1975). In *Brown* the police arrested the defendant

with *no* probable cause and subsequently presented all their investigative materials to him to coerce a statement. The Supreme Court based its opinion on the finding of the Illinois Court that at the time of his apprehension there was no probable cause (at p. 423):

> "The question of whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case."

And, the Court held that the purpose of the exclusionary rule was to remove the incentive to disregard constitutional guarantees (at p. 425). Thus, in the particular facts, the Court held specifically (at p. 42):

> "* * * The arrest, both in design and in execution was investigatory. The detective embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effectuated gives the appearance of having been calculated to cause surprise, fright, and confusion.
>
> We emphasize that our holding is a limited one. We decide only that the *Illinois* courts were in error assuming that the *Miranda* warnings by themselves, under *Wong Sun* always purge the taint of an illegal arrest."

None of these methods were used on Johnson. In fact, police asked him to come along voluntarily or be arrested. He chose arrest (R. 1338).

Petitioner severely distorts the record in his recitation of the facts on pages 30, 31, and 32 of his petition. Respondent cannot find in the record the statement alleged by petitioner "that police were not aware of the test results which showed a semen stain at the time of the arrest (2T 258)." On page 959 Marish explained they were told

about the semen but did not have "firsthand" knowledge. Just as he did not have firsthand knowledge of the arrest (R. 932) because he wasn't there. Murphy said that at 5:30 p.m. after checking out the (Bozak) information he checked out all police reports (R. 1241). At 7:00 Murphy, and Mulhall found Johnson at Martin's Oil (R. 1242, 928). Johnson greeted them with "You are here about the missing girl." They talked on the way downtown, and when they got there, Johnson went to the Scientific Unit for polygraph testing, obviously not in the record, as it did not exculpate him (R. 1421, 1246). Murphy went home at 12:30 after seeing Johnson again after his return from the Scientific Investigation Unit at 10:30 or 10:45; Mrs. Johnson was there too, outside the Detective Bureau. Mulhall told her as far as he was concerned, she should notify a lawyer (R. 1274). She even talked with Johnson and took his wallet home.

As stated by the Appellate court:

> "Under the circumstances of the case there was probable cause for the appellant's arrest."

4. Impoundment of an arrestee's unsecured automobile and later searches pursuant to the consent of the arrestee including the inventory of its contents is not unreasonable under the Fourth Amendment of the United States Constitution.

The seizure of petitioner's automobile was not illegal. Petitioner talks about a search, but none occurred until petitioner gave permission. *U. S. v. Watson,* 423 U.S. 411, 413, 425; *Schneckloth v. Bustamonte,* 412 U.S. 218 (R. 1287): "Yes, I did give permission." In the case at bar, the car itself was an instrumentality used in a criminal act, the attempted abduction of Kimberly Stevens, and when seen by an officer, was seizable, even though they may not

have had authority under *Carroll v. U. S.* (1925), 267 U.S. 132, 69 L. Ed. 554, and *Chambers v. Maroney*, 399 U.S. 42, 26 L. Ed. 2d 419 (1970), to pry into hidden places at that moment. *Cardwell v. Lewis*, 41 L. Ed. 2d 325 (1975). With a missing little girl, the State may well have had "exigent circumstances" to search, but since there was merely a seizure, no further justification need be made. To be safe, officers requested consent from Johnson after he returned from the Scientific Investigation Unit (R. 1247). Johnson *lied* that police "had to have the ignition keys" (R. 1345); in fact, he was cooperating with police (R. 1296) and took them to a Lakewood address at 1:00 a.m. in the morning returning at 2:15 when a cursory search was made at the impound lot, followed by inventory and processing by Scientific Officer Reynolds at 9:30 a.m. (R. 1310). He consented to the searches (R. 1302).

The keys were kept in a safe place at the Impound Office, according to police procedures (R. 1300), until the size of the stab wounds on Melissa's body were known, at which time it became apparent that the pen knife could be the weapon (R. 1311).

There is no unreasonable search or seizure where officers come upon evidence in plain view. *Harris v. U. S.*, 390 U.S. 234, 19 L. Ed. 2d 1067 (1968).

5. Where the affidavit for a search warrant contains all the information available from police investigation and sets forth such information including the corroborated reports of a named informant, the determination of a neutral magistrate to issue the warrant is not violative of the Fourth Amendment.

The fact is clear that before the police put Bozak's information in the warrant, it was checked out both with the Stevens family and Bozak, and the information came

from other police officers who had investigated various facets of the event of November 20th, 21st and 22nd. There was no misleading information in the warrant; there was some bad grammar. The case at bar is not a "reliable informant" case. Rather, the police investigative information alleged in the affidavit gives the underlying circumstances. *U. S. v. Ventresca* (1965), 380 U.S. 102.

The affidavit at bar clearly withstands the two-pronged test of *Aguilar v. Texas* (1964), 378 U.S. 108. That test provides that the affidavit must contain some of the underlying circumstances from which (1) the affiant concluded that a crime was being committed, and (2) the affiant concluded that either the informant was credible or his information reliable.

All that is required is that the affidavit set forth facts giving the magistrate reason to believe that the items in question are located in the premises. *Dunbar v. U. S.* (1925), 268 U.S. 435.

The appellate court, on pages 16 and 17 of its opinion, held that it would be straining judicial credibility to hold that the pertinent facts alleged did not justify issuance of the warrant.

6. Where an affidavit for a search warrant fairly sets forth the grounds for its issuance, and absent a showing of deliberate misleading by the affiant, the determination of a neutral magistrate finding probable cause is not violative of the Fourth Amendment.

Affidavits are to be given their common sense meaning and are not to be read hypertechnically. *U. S. v. Ventresca, supra.*

The appeals court found:

"It would be a straining of judicial credulity to hold that the affidavit supporting the warrant alleging (1) the murder of a missing child, (2) the search of an automobile bearing license plates listed to the appellant, (3) the discovery of a towel in the vehicle found to have semen thereon, (4) the discovery of the body of the missing girl in the Cleveland Metropolitan Park North Olmsted area, and (5) the necessity for an early search of the residential premises occupied by the appellant, would not be sufficient to justify a warrant here. The challenge to Mr. Charles Bozak's information, providing the license number of appellant's vehicle in association with an apparently attempted abduction in the nearby vicinity and attacking his credibility as a 'hearsay conclusion' does not accord with the affidavit statement concerning a witnessed attempted abduction.

We, therefore, hold that the warrant issuance requirements of *Aguilar v. Texas* (1964), 378 U.S. 108, have been satisfactorily met. The issuing magistrate who authorized the search warrant may do so on hearsay information provided that he is informed of some of the underlying circumstances on which the informant based his conclusions, and the circumstances from which the officer seeking the warrant determined the validity of the information. We find that these requirements were met in the affidavit executed by the issuing magistrate, and therefore, overruled this objection."

7. Where the credible evidence on motions to suppress and at trial show that the petitioner was repeatedly warned of his constitutional rights under Miranda, and absent a showing of coercion in obtaining exculpatory statements designed to mislead police authorities who are searching for an eight year old girl missing over twenty-four hours, night-time questioning is not in violation of the Fifth Amendment of the United States Constitution.

The *Miranda* rule places on the State the burden to demonstrate that full *Miranda* warnings were communicated to the accused, that he understood these warnings, and that he voluntarily chose to utter incriminating statements while in custody. *Miranda v. Arizona,* 384 U.S. 436 (1966).

The Court stated:

". . . we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such oportunity

afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona, supra,* at 478-479.

The State's burden is to show *Miranda* compliance by a preponderance of the evidence prior to its introduction at trial.

". . . When a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove . . . by a *preponderance of the evidence that the confession was voluntary.*" *Lego v. Twomey,* 404 U.S. 477, 489 (1972). (Emphasis added)

In *Michigan v. Tucker,* 417 U.S. 433, 41 L. Ed. 2d 182 (1974), the United States Supreme Court recognized the central concern—where the State's action offended the standards of fundamental fairness under the Due Process Clause, the State was then deprived of the right to use the resulting confession in Court (At 441).

The exercise of the privilege does not bar his later rescinding that prior decision. *Michigan v. Mosely,* 423 U.S. 96 (1975), 46 L. Ed. 313.

From the moment of his contact with Detectives Murphy and Mulhall, Johnson was advised of his rights and at each stage of the proceedings he was readvised (R. 1243, 1408, 1130, 927, 1306, 1120). Johnson was not subject to "incessant interrogation".

The record will show that from the time Johnson was taken to Central Police Station, 8:00 p.m., by general duty officers, until after 10:00-10:30 p.m., he was at the Scientific Investigation Unit for polygraph testing (R. 1343, 1246-47). He talked with his wife (R. 1283), and the detectives, and at 11:30 he was booked into the jail unit. He left shortly thereafter to go get his keys with general duty officers. He was returned to be printed and photographed at the Scientific Investigation Unit (R. 2161), and was released to the jail unit at 2:00-2:30 a.m. Then Homicide Detective Koelliker advised him of his rights and took an oral statement which was exculpatory (R. 2163). Koelliker put him back in his cell about 4:00 a.m. (R. 2139-2177). [Johnson made up a story of yet another interrogation (R. 1347) between 4 a.m. and 6 a.m. (R. 1349).] Petitioner cites the record at 1351 for the time Murphy told him he would be released if he made a statement. A reading of the record will show that he alleged that it was around 6 a.m. (R. 1350). That Murphy or Mulhall took him up and asked him to make a statement and he asked for an attorney. Obviously, the testimony showed Murphy went home before midnight, Mulhall at 2:30. He made up the story of the questioning and the request for counsel (R. 1352, 1248, 1274). Melissa Hinke was still a missing person (R. 2177, 1980, 2316), and the police were searching day and night for any clue, hoping she might be found alive. His stories were consistently exculpatory.

At 8:30 a.m., Johnson was brought down to be released (R. 1308, 1923). The general duty officers were not aware of his oral statement to Detective Koelliker, and they took a written statement, a witness statement, because they believed Johnson to be innocent and were letting him go. (See testimony of Marish, Mulhall, and Murphy, R. 2314, 1353).

Not even petitioner claimed that the statements were involuntary; his only claim was that he could not remember anyone, except the polygraph people explaining his rights. (Petitioner's testimony, R. 1333, 1340, 1408). Defense counsels' allegations that police purposely sought to mislead Johnson as to his need for a lawyer is a misstatement of the record in this case.

The State produced the evidence of Johnson's repeatedly being advised of his rights and his free and voluntary decision to speak at each stage (R. 1243, 1130, 1408, 1916, 2161, 2316, 2405). In the motion testimony, out of the presence of the jury, the Court had to weigh the testimony of petitioner, which was not credible, in determining whether the evidence should be suppressed in trial.

The record reflects that on November 23, 1975, when police returned to the jail and petitioner told them he had a lawyer, no attempt was made to question him until Attorney Mike Tholl talked with him and stated, "No statements today." (R. 2322, 1358). Petitioner's right to remain silent and right to counsel were scrupulously honored.

There is no question as alleged by petitioner that police investigation of the point by point lies of Johnson as to his whereabouts on November 20, 1975 aided in convicting Johnson; just as that same investigation would have exculpated him if he was telling the truth.

As recognized by the appeals court credibility was of prime importance in reviewing this question. There is no factual or legal reason for this Court to substitute its judgment for the lower courts on the issue of credibility.

8. Where a defendant in custody is warned of his constitutional right to counsel, has the opportunity to speak with his family, travel about the city with police and obtains his car keys from friends, and during that course of time gives police a plausible exculpatory alibi as to the crime concerning which he is being asked questions, and absent a showing of deliberate denial of counsel, there is no violation of the Sixth and Fourteenth Amendments.

The facts alleged on pages 52 and 53 of petitioner's petition are not supported by the record. (1) There was no lengthy, continuous, custodial interrogation; (2) Johnson was at the polygraph, not with Marish, Mulhall and Murphy from 7:30 until 10:30 (R. 1246, 1272, 1274); (3) Mrs. Johnson was treated with simple courtesy, not deception (R. 1244, 1273, 1274, 1282); when Marish and Mulhall left him at 2:30, he was *not* a suspect (R. 1294, 1303), and a witness statement was taken for he was being released (R. 1248-49, 1353).

9. Where after arraignment on a crime and during the investigatory stages of other crimes, a defendant who is then unrepresented by counsel requests a police officer to talk with him, and after his Miranda warnings makes a limited admission, without a request for counsel, there is no violation of the Fifth, Sixth, or Fourteenth Amendments of the United States Constitution.

Sergeant Comodeca was never questioned by defense counsel during the motions (R. 1056-1064) about the forty minutes he spent with John Johnson on November 28, 1975. In his cross-examination in the case-in-chief however, he was accused of exhibiting photographs which he denied, and verbal abuse which he denied (R. 2317, 2326).

There is no question that petitioner, after sitting listening to all the witnesses and taking notes, was lying, just like he did to Officers Mulhall and Murphy on November 22, 1975 (See Statement to Murphy, R. 1245), and the Court's ruling on the evidence was proper in motion testimony as the Court had to determine it on the credibility of the witness. Police had scheduled show-ups for the 28th—a Saturday, when the children were out of school—(R. 1060) for sex crimes victims (R. 2317), and when Attorney Mike Tholl quit at the arraignment (R. 2322), police proceeded with their investigation of those sex crimes as well as Melissa Hinke. The "questioning" and show-ups took place between 10:15 a.m., when petitioner was arraigned (R. 2316), and 11:00 a.m., when Detective Ferris came in and Sergeant Comodeca left (R. 2316, 2405).

Petitioner volunteered a statement to Detective Ferris (R. 2405). Even petitioner said Detective Ferris treated him fairly, telling him he did not have to talk at all (R. 1361).

There is no question from the statements both on November 22, 1975 and November 28, 1975 that John Johnson's statements both were "exculpatory" in nature. First, on the 22nd he gave a plausible explanation of his activities on the 20th, evidenced by the way the police treated him; letting him call his wife; getting the manager to the station (R. 1244); allowing for his wife and himself to see each other at 10:30 when she took his wallet (R. 2488); and releasing him from the jail (R. 1248). On the 28th he told Detective Ferris (paraphrased), "I could have, but I have these blackouts." (R. 2405 and following). Neither was a "confession".

There is also no question that Johnson had his constitutional right to the assistance of counsel. The fact is clear, the lawyer quit. The police had procedures scheduled

(R. 2322), and they went about their business (R. 1093). The Supreme Court has recently held in *Michigan v. Mosley*, 46 L. Ed. 2d 313, where after the initial questioning and exercise of his right to counsel petitioner made a separate statement with regard to another crime, the right to police to continue their investigations is not cut off by requesting a lawyer with regard to one of the crimes. The exercise of Johnson's right to counsel was scrupulously honored when police waited for Attorney Mike Tholl on November 23rd (R. 2322), as Johnson said he wanted a lawyer. On the 28th, Johnson got his rights again, having had the assistance of counsel who quit, police spent forty minutes in an *open* room with him during which time victims viewed them (R. 2316). At the end of the forty minutes, Johnson told Detective Ferris (R. 2404), who had just arrived, he wanted to talk to him privately. Are police required to look into Tholl's motivation for quitting, or Johnson's motivation for self-doubt and perhaps remorse? The court has the opportunity to measure the credibility of Johnson and Comodeca and the court clearly found that Johnson's statement to Detective Ferris was voluntary. The appellate court found no abuse of discretion in the trial court's admission of the statements.

The appellate court specifically addressed the issue of voluntariness of consent and applied the United States Supreme Court decision in *Schneckloth v. Bustamonte* (1973), 412 U.S. 218:

> "In determining whether a defendant's will was overcome in a particular case, the court has assessed the totality of all the surrounding circumstances—both the characteristic of the accused and the details of the interrogation."

The evidence clearly showed Johnson to understand what he was doing, in that he was capable of consistently

deceptive stories. He was a mental match for the officers; the stories proved to be a lie.

Counsel has carefully quoted Detective Ferris as saying that "Johnson stated he would not make any statement without his attorney present." (Page 55). A simple reading of Ferris' testimony will show that after his oral admission to Ferris, Johnson said he would not make a *written statement* (R. 1078, 1086) without first talking to the new lawyers the court was going to appoint (R. 2427). The word *statement* was being used as a description of the physical paper produced by a police stenographer (R. 1362), not in the form lawyers interpret that word. That was understood in the trial court.

10. Where a person in custody, properly warned, chooses to participate in oral conversation with a police officer, and makes limited admissions, but later decides not to make a written statement without consulting with a lawyer, there is no violation of the Fifth Amendment with respect to the oral admission.

At Johnson's request Ferris received an oral statement from Johnson after he had expressly warned him of his rights, and at (R. 2405 and 1361):

> "John, you know you don't have to talk to me because anything you tell me could be used against you if it ever goes to court."

After that private interview he told Ferris he would not make a written statement until he talked to his new attorneys.

Petitioner's calculation of time at page 58 of his petition is a continuing pattern of stretching the record. Comodeca entered the room 15 minutes after he left Ferris and Johnson alone. No admission made after his reentry into the room was admitted in evidence.

11. Where a show-up is staged, after arraignment on another crime at which time petitioner is not represented by counsel, and there is no unnecessarily suggestive identification procedure resulting in an in-court identification, there is no violation of the Sixth and Fourteenth Amendments.

Under Ohio Revised Code, Section 2945.59, the legislature has specifically authorized proof of other acts.

The like or other acts which may be shown within the contemplation of the statutes are acts of a character so related to the offense for which petitioner is on trial that they have a logical connection therewith, and may reasonably disclose a motive or purpose for the commission of such offense. *State v. Moore*, 149 Ohio St. 226 (1948).

In the case of the testimony of Kimberly Stevens, such testimony was not an "other act" but was part of the continuous course of conduct of petitioner on November 20, 1975. The other act introduced as a similar act was the attempted abduction of Lisa Chambers on November 14, 1975, as she walked to school. The evidence showed petitioner's mode of attempting to induce little girls into his car, the absence of mistake, intent and motive on his part, or legitimacy of looking for "T.J." with Mari Nettgen.

In each case shown at trial, John Johnson drove his car to an area near a school, and in each case, he attempted to entice a little girl into his car. In each case, petitioner chose the time that children were on their way to or from school (absence of mistake). The similarity of the acts is clear, always little girls and school zones. The jury must necessarily determine the facts from the relevant evidence, and in this case, all the acts are relevant for the purposes enumerated in the statute.

Third grader Kimberly Stevens did not identify John Johnson in Court. She described him with a mustache and dark hair, driving the Buick identified by Bozak (R. 1704-1725, 745-767). Detective Cudo interviewed her on November 22, 1975, and got that description; he showed her one picture; she was not exposed to an identification procedure. Her mother corroborated the time (R. 1731-1741), and getting the information from Bozak to the police. Bozak could not make a positive identification (R. 1754); he could see the man was clean and well-groomed, but couldn't see his face and thought he might have a full beard (R. 1767). One thing for sure, the man driving the red Buick, black top, two door, 350184, Ohio, at 2:45 at 52nd and Eichorn tried to abduct Kimberly. Petitioner had every opportunity to overcome this evidence; coupled with his statement and his continuous possession of the car, proved by Mari Nettgen and John Mesco, there is only one inference that could be drawn from this circumstantial evidence.

On November 14th, Lisa Chambers told her mother about John Johnson attempting to pick her up, and gave her mother a detailed description of the car and the driver (R. 814). She saw a news media picture (R. 856) (NOTE: Press coverage did not depict Johnson with glasses), and told her mother it looked like the man, then her mother kept her away from other news (R. 854). Cudo got her description on November 26, 1975 (R. 2180). Ferris went out on November 28, 1975, and displayed six photos (R. 882, 2398, B-8). Johnson's lawyer had quit, and other lawyers, one of whom quit, were to be appointed (R. 1093).

She saw Johnson's picture in the group, and it looked like the man (R. 859). The police took her downtown, and told her to look through the mirror, *with no further instruction* (she did not know the men in the room) (R. 862); the paragraph on pages 59-60 of petitioner's brief

is not supported by the record (837-860). "I didn't know it before" (R. 867, 868-874). "I said I am almost positive it really looked like it, but I couldn't be sure." (R. 1816). No one told her who to pick out (R. 868) (R. 1817). Her mother, Betty Harry, corroborated the things that happened. "All she said was that she was almost positive . . . What do you mean? I don't remember them telling us anything about the man." Ferris then took Lisa to the impound unit (R. 885), where Lisa walked directly into the lot and identified Johnson's car (R. 886). Lisa did not make a positive identification, but by direct and circumstantial evidence, unrebutted either in the motion or on direct examination with full notice to defense attorneys and their investigators, there could be but one inference drawn. John Johnson was the man driving the car on November 14, 1975, and he tried to pick up Lisa Chambers by the same method that he had tried to get Mari Nettgen and Kimberly Stevens.

Petitioner maintains that under *U. S. v. Wade,* 388 U.S. 218, 240 (1967), the "unequivocal court room identification" which Lisa never made ought to be *per se* excluded under the authority of *Gilbert v. California,* 388 U.S. 263, 273 (1967), which relies on *Wong Sun v. U. S., supra,* and *Mapp v. Ohio,* 367 U.S. 643 (1961). In *Gilbert,* the Court held that where there is a post indictment lineup, sixteen days after arraignment and appointment of counsel, the State is permitted to show the absence of illegality under *Wade,* except where the illegal lineup is "come at by exploitation of [the primary] illegality." *Gilbert's* thrust, under California Law was that the testimony concerning prior identification would tend to bolster the in-court identification before the jury. In the case at bar, defense counsel brought out the pre-trial attempt at identifying petitioner (R. 1814), attempting to weaken her circumstantial identification of petitioner and his vehicle.

The right to the assistance of counsel has been applied at stages of the prosecution where the denial of a fair trial must invariably result, and the possibility of unfairness inherent in confrontations for identifications have resulted in the *Wade* rule. The record here shows that an eleven year old girl had seen a picture of John Johnson in the paper, and told her mother it looked like the man who attempted to pick her up. Having picked a picture of John Johnson as looking like the man (R. 2398); and having a show-up (R. 2399), where the totality of the circumstances were shown to the Court, and the girl said, "I am almost positive it really looked like it, but I couldn't be sure,"; and (R. 1816) then picked out the car (R. 2400); the question is whether in the totality of the circumstances police conduct in this procedure of non-identification denied petitioner a fair trial which presence of counsel would have cured. *Stovall v. Denno,* 388 U.S. 293, 302 (1967); *State v. Hurt,* 30 Ohio St. 2d 86 (1972).

The Court should note that Ohio Revised Code, Section 2945.55 specifically authorized testimony of previous identification, which was the growing trend among the states at the time of *Gilbert* (Op. Cit. at 272, Footnote 10).

The trial court held that the procedure and testimony offered did not violate due process in the totality of the circumstances (R. 1558), even if the Court would find a taint in the tentative identification of Johnson, her positive identification of his vehicle is competent. The Court was shown that the station house show-up was non-suggestive, and all she remembered was from the day of the incident. *Neil v. Biggers,* 409 U.S. 188 (1972).

CONCLUSION

From the very outset of the case at bar, defense counsel's announced purpose was to try this case in the higher courts (R. 294, 422, 782, 1194, 2467, 2469).

Petitioner never sought the truth of the matter, even in this petition before this Court he has chosen to characterize the record unfairly. In his appendix he chooses to include his "Motion(s) for Reconsideration", before the Court of Appeals of Cuyahoga County and the Ohio Supreme Court as if they carried the significance of the lower court holdings. Even his partial inclusion of the record on Appendix 57A fails to point out that the court waited for petitioner to be brought to the courtroom, then began:

"All right. The Court . . ."

This same art was used by counsel at the trial level waiting until February 18th, with a special venire having been summoned for the 23rd to ask for a continuance, a change of venue, and the entry of a plea of not guilty by reason of insanity.

All this skill of his superior lawyers was directed at one goal, to get this Court to substitute its judgment of the facts for that of the trial judge, jury, and appeals court. Perhaps this Court has the insight to draw out the credibility of eight year old Kimberly Ann Stevens at (R. 645-649):

> "Then I was walking home from school. I was about to cross the alley when a red car pulled up in front of me and said 'Come here little girl,' and motioned a few more times. . .
>
> . . . my shoe was unbuckled, so, I kneeled down and buckled it and, then, the door slammed shut and I ran the other way.
>
> . . . I thought he might be trying to get me."

Or perhaps the court can see her little hand at (R. 667) as she indicated how he beckoned her with his index finger.

The same can be said for Mr. Bozak, the Dairyman, or Mari Nettgen, or Lisa Chambers, or Jerry Marish, Bill Hanton, Murphy, Mulhall, Pete Comodeca, or Don Ferris. Petitioner asks this Court to call them all liars based upon the transcripts of the case.

At trial, the record is clear, the judge gave expansive discovery, wide latitude for cross-examination, and required the State to produce all its substantive witnesses in motion testimony before petitioner rebutted anything.

He got up and lied.

The petitioner in this cause has been given fair treatment from his first contact with "red faced" Bill Hanton who left the Lawson milk in the car and Johnson at his home; to the time of his sentencing. He has had his case tried twice at the trial level on motions and in chief, has had the benefit of highly skilled counsel and psychiatrists to present his defenses and test the State's evidence.

The evidence, the bloody shorts, the car, the admissions and deceptions left no doubt of his guilt.

The record of the case simply does not bear out the questions presented by petitioner, and the respondent respectfully urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUN 29 1979
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Case No. 78-1573

JOHN JOHNSON,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October Term, 1978

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v.

STATE OF OHIO,

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent's claim that petitioner has misconstrued the record in this case is completely without substance and is an attempt to cloud a record which amply supports the arguments presented in the petition for writ of certiorari. Petitioner has re-examined the facts set forth in his petition, particularly those to which respondent has objected, and reaffirms the correctness of his statements of fact. Indeed, it is the respondent, not the petitioner, who has sought to argue facts

which are totally unsupported by the record. [1]

Because of respondent's attempt to muddy a record which is, in fact, quite clear, petitioner has requested the Clerk of Courts for Cuyahoga County, Ohio to certify and transmit the transcript of the trial court proceedings to this Court, [2] should this Court wish, or deem it necessary, to verify the factual circumstances of this case.

Petitioner submits that, rather than detracting from petitioner's arguments, respondent's brief actually underscores the significance of this case and the importance of granting certiorari to clarify questions of broad application in the field of criminal justice.

Wherefore, petitioner respectfully requests that a writ of certiorari issue tc the Supreme Court of the State of Ohio and that, upon review, petitioner's convictions be reversed.

Respectfully submitted,

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[1] At page 9 of respondent's brief (last paragraph), respondent claims in its statement of the case that "At 10:30 - 10:45, Johnson was returned to the General Duty detectives; he had not passed the lie detector..." Nowhere in the entire record was there any mention of the results of polygraph testing. In fact, the trial court admonished against any disclosure. (3T 1420-1421)

[2] See, petitioner's request for certification and transmittal, Appendix at 1.

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FILED
COURT OF APPEALS
JUN 22 1979
GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY, OHIO

June 22, 1979

Gerald E. Fuerst
Clerk of Courts
Cuyahoga County
Justice Center
Cleveland, Ohio 44113

Attention: Al Chesnik
Clerk's Office - Court of Appeals

Re: State v. John Johnson
Common Pleas Case No. CR-23071
Court of Appeals Case No. 36618

Dear Sir:

You are hereby requested, pursuant to United States Supreme Court Rule 21(A) to certify and transmit the transcript of the proceedings in the Cuyahoga County Common Pleas Court, Case No. CR-23071, to the United States Supreme Court. This request to certify is in connection with a petition for writ of certiorari filed on behalf of John Johnson which is now pending before the United States Supreme Court, Case No. 78-1573.

The transcript should be directed to:

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Very truly yours,

BERKMAN, GORDON, KANCELBAUM, LEVY and MURRAY

By: Bernard A. Berkman
Bernard A. Berkman
Counsel for John Johnson

BAB:pe

cc: James M. Cain, Assistant Prosecuting Attorney
The Honorable Michael Rodak, Clerk
United States Supreme Court